

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 2:10-cv-01043-TFMA

BEST MEDICAL INTERNATIONAL, INC.

Plaintiff,

Vs.

ACCURAY, INC. a corporation; ROBERT
HILL, David Spellman, John David Scherch,
Marcus Bittman.

Defendants

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)
) AMENDED COMPLAINT IN
) PATENT INFRINGEMENT
)
) Related to Document 33
)
) Filed on behalf of the Plaintiff

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JURY TRIAL DEMANDED

the laws of the State of California with a principal place of business at 1310 Chesapeake Terrace, Sunnyvale, California 94089. Accuray maintains a place of business/office in the Western District of Pennsylvania.

4. The Defendant Robert Hill (Hill) is an adult individual who currently resides in 1370 Westmont Ave., Campbell, CA 95008

5. The Defendant, David Spellman (Spellman), is an adult individual who currently resides at 96 Seldom Seen Road, Wexford, Pennsylvania 15090.

6. The Defendant John David Scherch, (Scherch), is an adult individual who currently resides at 438 S. Dallas Avenue, Pittsburgh, Pennsylvania 15208.

7. The Defendant Marcus Bittman (Bittman) is an adult individual who currently resides at 323 Summerfield Drive, Baden, Pennsylvania 15005.

III. BACKGROUND

A. OWNERSHIP OF PATENT

8. U.S. Patent No. 5,596,619 (the '619 Patent) issued on January 21, 1997 from U.S. Patent Application No. 08/245,626 which was filed on May 17, 1994 in the U.S. Patent and Trademark Office. A copy of the '619 Patent forms Exhibit 1 attached hereto.

9. Summary description of the '619 Patent found in the patent abstract is as follows: A method and apparatus for conformal radiation therapy, with a radiation beam having a pre-determined, constant beam intensity, treats the entire tumor volume of a patient's tumor, and the beam intensity of the radiation beam is spatially modulated across the tumor, by separating the radiation into a plurality of treatment beam segments and independently modulating the beam intensity of the plurality of radiation beam

segments. The independent modulation of the beam intensities may be accomplished by selectively and independently filling, or removing, a flowable, radiation blocking material from a compartment associated with each radiation beam segment.

10. The subject matter of the '619 Patent is generally described in the oncology community as Intensity Modulated Radiation Therapy, hereafter referred to as "IMRT" or IMRT technology. The intensity of the radiation in IMRT can be changed during treatment to spare more adjoining normal tissue than is spared during conventional radiation therapy. Because of this, an increased dose of radiation can be delivered to the tumor using IMRT technology. Intensity modulated radiation therapy is a type of conformal radiation, which shapes radiation beams to closely approximate the shape of the tumor. This technology was invented by North American Scientific and subsequently acquired by Plaintiff as the result of Best Medical's purchase of the assets of NOMOS Corporation.

11. U.S. Patent No. 7,266,175 (the '175 Patent) issued on September 4, 2007 from U.S. Patent Application No. 10/887,966 which was filed on July 9, 2004 in the U.S. Patent and Trademark Office. A copy of the '175 Patent forms Exhibit 2 attached hereto.

12. Summary description of the '175 Patent found in the patent abstract is as follows: Method and apparatus for controlling the correlation between the factors of treatment plan efficiency and dosimetric fitness to optimize the radiation therapy, or radiotherapy plan, include providing user control of the segment count, user control of total monitor units, and selection of an optimization algorithm as a method of controlling treatment efficiency.

13. U.S. Patent No. 6,038,283 (the '283 Patent) issued on March 14, 2000 from U.S. Patent Application No. 08/957,206 which was filed on October 24, 1997 in the

U.S. Patent and Trademark Office. A copy of the '283 Patent forms Exhibit 3 attached hereto.

14. Summary description of the '283 Patent found in the patent abstract is as follows: A method and apparatus for determining an optimized radiation beam arrangement for applying radiation to a tumor target volume while minimizing radiation of a structure volume in a patient, which uses an iterative cost function based on a comparison of desired partial volume data, which may be represented by cumulative dose volume histograms and proposed partial volume data, which may be represented by cumulative dose volume histograms for target tumors and tissue structures for delivery of the optimized radiation beam arrangement to the patient by a conformal radiation therapy apparatus.

15. NOMOS Corporation acquired the rights to '619 Patent which is reflected in an assignment from the inventor, Mark P. Carol, executed April 19, 1994 and recorded in the U.S. Patent and Trademark Office May 17, 1994 at reel/frame 007006/0560. NOMOS Corporation acquired the rights to '175 Patent which is reflected in an assignment from the inventor, Merle Romesberg III, executed July 30, 2007 and recorded in the U.S. Patent and Trademark Office July 30, 2007 at reel/frame 019620/0083. NOMOS Corporation acquired the rights to '283 Patent which is reflected in an assignment from the inventors, Mark P. Carol, Robert C. Cambell, Bruce Curran, Richard W. Huber and Richard V. Nash, executed on December 23, 1996 and January 2, 1997 and recorded in the U.S. Patent and Trademark Office June 12, 2002 at reel/frame 012973/0723.

16. On September 11, 2007, Plaintiff, Best Medical purchased most of the assets of NOMOS Corporation and North American Scientific. Included in said sale

were patents, patents pending and licensing agreements, and other intellectual property owned by Vendors. As the result of its purchase, Plaintiff is the owner of '619 Patent, the '175 Patent and the '283 patent. An assignment of the rights to '619 Patent, the '283 Patent and the '175 Patent from NOMOS Corporation to the Plaintiffs was executed September 17, 2007 and recorded in the U.S. Patent and Trademark Office November 2, 2007 at reel/frame 020062/0709.

B. RELATED CASES

17. This case is related to a suit filed in this Court by Defendant Robert Hill at CA 07-1709 against Plaintiff, Best Medical. Defendant Hill was a former employee of the Plaintiff, who voluntarily resigned from his employment with Plaintiff and negotiated with and accepted employment with the Defendant, Accuray, notwithstanding the terms of his employment contract with NOMOS Corporation that contained a Non-Compete clause. Hill's NOMOS employment contract was assigned to Plaintiff, Best Medical. Thereafter, Defendant Hill sought damages from Plaintiff for its alleged failure to fully pay benefits due to Defendant Hill at the time of his resignation. Plaintiff counterclaimed asserting: After Defendant Hill's departure from employment with Plaintiff, he downloaded confidential, proprietary intellectual property and trade secrets of Plaintiff from Plaintiff's computers, without Plaintiff's knowledge or consent.

18. Thereafter, and at various times, thereafter, the Defendants' Scherch, Spellman and Bittman, in collusion with the Defendant Hill and Accuray, also resigned their positions at Best Medical, and they too, like Defendant Hill, downloaded confidential proprietary intellectual trade secrets of Plaintiff from Plaintiff's computers without the knowledge or consent of Plaintiff. They too became employed at Accuray.

19. On October 6, 2008, Plaintiff filed suit in this Court at CA 08-1404

against Defendants' Hill, Bittman, Scherch, and Spellman alleging, inter alia, the torts of conversion and theft of trade secrets in violation of Pennsylvania law.

20. On the 15th day of March 2008, and on April 11, 2008, the parties to the aforementioned suits, entered into stipulated court ordered injunctions. Wherein, the Defendants in that case inter alia surrendered their computer hard drives and submitted them for analysis pursuant to the Court Order. Said Order provided inter alia:

1. Defendants are enjoined and prohibited from using Best Medical's "confidential and proprietary information and trade secrets" in any way, including use in any occupation and/or business venture in which Defendants are involved.

2. Defendants are enjoined and prohibited from imparting, disclosing, and/or reproducing Best Medical's "confidential and proprietary information and trade secrets" to any other person or entity, without the prior, written consent of an officer of Best Medical, or unless provided for in this Stipulated Order of Court.

3. For purposes of this Stipulated Order of court, Best Medical's "confidential and proprietary information and trade secrets: shall include, but are not limited to (i) applications, source code and data files regarding products of Best Medical and/or NOMOS, (ii) Best Medical and/or NOMOS product development documents and information, and (iii) Best Medical and/or NOMOS marketing research materials. It shall also encompass any other information which is protected by Best Medical and/or NOMOS as confidential information, including, but not limited to, information concerning Best Medical's and/or NOMOS' accounts, sales, sales volume, sales methods, sales proposals, internal financial data, customers or prospective customers, prospect lists, company

manuals, formulae, products, processes, flow charts, plans, drawings, designs, technical specifications, methods, compositions, ideas, improvements, inventions, research, computer programs, system documentation, software products, patented products, copyrighted information, know-how and operating methods and other trade secret or proprietary information belonging to Best Medical and/or NOMOS or relating to best Medical's and/or NOMOS' affairs that are not public information.

21. Plaintiff instituted a civil action in the U.S. District Court for the Western District of Pennsylvania at No. CA 09-01194 on September 2, 2009 against the Defendant Accuray and the individual Defendants, contending inter alia, that the Defendant engaged in a conspiracy to steal Plaintiff's trade secrets and confidential and proprietary information.

22. The three cases, referenced above were consolidated by Order of Judge Standish on March 16, 2010.

23. Throughout the pleadings and proceedings in the consolidated cases, the Defendants have asserted that Accuray is not in competition with Plaintiff; that the individual Defendants did not reveal any trade secrets to Accuray and that the product of Accuray known as the CyberKnife System was dissimilar from any Best Medical's Technology.

C. PLAINTIFFS PATENTED PRODUCTS

24. The proprietary technologies disclosed in the '619 Patent, the '283 Patent and the '175 Patent were each developed in Western Pennsylvania.

25. Following the acquisition of this technology the Plaintiff has maintained a

manufacturing facility in Western Pennsylvania that has significant responsibilities for the commercialization of the '619 Patent, the '283 Patent and the technology described in the '175 patent by Plaintiff.

26. Plaintiff has and continues to commercially exploit the patented technologies of the '619 patent, the '283 patent and the '175 patent by making, offering for sale, and selling within the United States patented articles protected under these patents including BEST® Gamma Teletherapy™ Systems that can be equipped with Multi-leaf collimator (MLC) for IMRT, NomosSTAT™ Serial Tomotherapy, Corvus® treatment planning system with forward and inverse planning that has been offered under the Theratron® Equinox™ brand.

27. 35 U.S.C. § 287 (a) defines that “Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word "patent" or the abbreviation "pat.", together with the number of the patent, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.”

28. Pursuant to 35 U.S.C. § 287 (a) the Patentee has and continues to mark all products made, sold or offered for sale under the '619 patent with the appropriate patent marking; the Patentee has and continues to mark all products made, sold or offered for

sale under the issued '283 patent with the appropriate patent marking, and the Patentee has and continues to mark all products made, sold or offered for sale under the issued '175 patent with the appropriate patent marking.

29. Defendants Hill, Spellman, Scherch, and Bittman worked at the Plaintiff's manufacturing facilities in Western Pennsylvania.

30. Defendants Hill, Spellman, Scherch, and Bittman were aware of the '619 patent and the '283 Patent during their employment with Plaintiff. Defendants Hill, Spellman, Scherch, and Bittman were aware of the technology described in the patent application serial number 10/887,966 ,which issued as the '175 patent, during their employment with Plaintiff.

31. Defendants Hill, Spellman, Scherch, and Bittman were aware of Plaintiff's commercialization of the '619 patent and of the '283 patent during their employment with Plaintiff and the Plaintiff's products made, sold and offered for sale under the '619 patent and the '283 patent. Defendants Hill, Spellman, Scherch, and Bittman were aware of Plaintiff's commercialization of the technology described in the patent application serial number 10/887,966 ,which issued as the '175 patent, during their employment with Plaintiff and the Plaintiff's products made, sold and offered for sale under the technology described in the patent application serial number 10/887,966 ,which issued as the '175 patent.

32. Defendants Hill, Spellman, Scherch, and Bittman responsibilities during their employment with Plaintiff related to and were intended to advance the Plaintiff's commercialization of the '619 patent and the '283 patent. Defendants Hill, Spellman, Scherch, and Bittman responsibilities during their employment with Plaintiff related to and were intended to advance the Plaintiff's commercialization of the technology

described in the patent application serial number 10/887,966 ,which issued as the ‘175 patent.

33. Prior to departure of Defendants Hill, Spellman, Scherch, and Bittman from their employment with Plaintiff, Defendant Accuray was aware of Plaintiff’s ‘619 patent and Plaintiff’s ‘283 patent. Prior to departure of Defendants Hill, Spellman, Scherch, and Bittman from their employment with Plaintiff, Defendant Accuray was aware of the technology described in the patent application serial number 10/887,966 ,which issued as the ‘175 patent.

34. Prior to departure of Defendants Hill, Spellman, Scherch, and Bittman from their employment with Plaintiff, Defendant Accuray was aware of at least some of Plaintiff’s commercial products which were manufactured, sold and offered for sale under Plaintiff’s ‘619 patent and under the ‘283 patent. Prior to departure of Defendants Hill, Spellman, Scherch, and Bittman from their employment with Plaintiff, Defendant Accuray was aware of at least some of Plaintiff’s commercial products which were manufactured, sold and offered for sale under the technology described in the patent application serial number 10/887,966 ,which issued as the ‘175 patent.

35. Prior to departure of Defendants Hill, Spellman, Scherch, and Bittman from their employment with Plaintiff, Defendant Accuray was aware of at least some of Defendants Hill, Spellman, Scherch, and Bittman employees responsibilities relating to at least some of Plaintiff’s commercial products manufactured, sold and offered for sale under Plaintiff’s ‘619 patent, Plaintiff’s ‘283 patent and under technology described in the patent application serial number 10/887,966,which issued as the ‘175 patent.

COUNT 1 – Defendant Accuray

DIRECT INFRINGEMENT OF THE '619 PATENT BY THE CYBERKNIFE®
VSI SYSTEM SOLD BY DEFENDANT ACCURAY

36. All of the above paragraphs, namely 1 through 35 above, are incorporated herein by reference.

37. On or about February 28, 2010, the Defendant Accuray filed its 10Q SEC Report for the 4th quarter of 2009. In said report, Defendant Accuray announced that it had developed and is marketing a new product, CyberKnife® VSI System which utilized IMRT technology.

38. The Defendant Accuray on November 2, 2009 (a Press Release), that it had developed a new product, the CyberKnife® VSI System, which employed technology, known as Intensity Modulated Radiation Technology (IMRT).

39. Defendant Accuray accuracy is currently manufacturing, selling and/or offering for sale the CyberKnife® VSI System

40. Claims 2 and 17 of the '619 patent define:

2. An apparatus for use in conformal radiation therapy of a tumor, comprising:
(a) a radiation beam source for producing a radiation beam having a predetermined, constant beam intensity;
(b) means for separating the radiation treatment beam into a plurality of radiation beam segments, with at least one beam segment being disposed contiguous to at least three adjacent beam segments; and
(c) means for independently modulating the beam intensity of the plurality of radiation beam segments to spatially modulate the beam intensity of the radiation treatment beam across the tumor.

17. An apparatus for use in conformal radiation therapy of a tumor with a radiation beam

from a radiation beam source, the radiation beam having a predetermined, constant beam intensity, comprising:

(a) means for separating the radiation treatment beam into a plurality of radiation beam segments, with at least one beam segment being disposed contiguous to at least three adjacent beam segments; and

(b) means for independently modulating the beam intensity of the plurality of radiation beam segments to spatially modulate the beam intensity of the radiation treatment beam across the tumor.

41. The CyberKnife® VSI System is an apparatus for use in conformal radiation therapy of a tumor.

42. The CyberKnife® VSI System includes a radiation beam source for producing a radiation beam having a predetermined, constant beam intensity or an equivalent thereto.

43. The entire treatment beam of the CyberKnife® VSI System is divisible into individual components or segments and the CyberKnife® VSI system includes a means for separating the radiation treatment beam into a plurality of radiation beam segments, or an equivalent thereto.

44. The CyberKnife® VSI System provides a treatment beam collection wherein at least one beam segment is disposed contiguous to at least three adjacent beam segments, or equivalent to this structure.

45. The CyberKnife® VSI System provides for independent modulation of individual components of the entire treatment beam thus providing means for independently modulating the beam intensity of the plurality of radiation beam segments to spatially modulate the beam intensity of the radiation treatment beam across the tumor,

or an equivalent thereto.

46. The manufacture, use, sale or offer for sale of the CyberKnife® VSI System infringes at least one of claims 2 and 17 of the Plaintiff's '619 patent as a direct infringement under at least 35 U.S.C. § 271 (a).

47. Pursuant to 35 U.S.C. § 287 (a) the filing of this action for infringement is notice to the infringer of infringement of the '619 patent. Further Plaintiff sent written notice of infringement of the '619 patent in a letter dated December 10, 2010. Finally the Plaintiff sent written notice that the marketing, use, manufacture and sale of the CyberKnife® VSI product is an infringement of the '619 patent in a letter dated December 16, 2010.

48. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Accuray to stop the marketing, manufacture and sale of CyberKnife VSI, and any other Accuray product employing IMRT technology as claimed in the '619 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- a. Declaring that United States Letters Patent of the '619 patent was duly and legally issued, is valid and is enforceable;
- b. Declaring that Defendant Accuray has directly infringed one or more claims of the '619 patent;
- c. Declaring that Defendant Accuray has willfully infringed one or more claims of the '619 patent;
- d. Deeming this to be an "exceptional" case within the meaning of 35

U.S.C. § 285, entitling Plaintiff to an award if its reasonable attorney fees, expenses and costs in this action; and

- e. Permanently enjoining Defendant Accuray and its respective officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '619 patent pursuant to 35 U.S.C. § 283;
- f. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- g. Awarding Plaintiff its costs in connection with this action; and
- h. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- i. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 2 –Defendant Accuray

CONTRIBUTORY INFRINGEMENT OF THE '619 PATENT BY THE
CYBERKNIFE® VSI SYSTEM SOLD BY DEFENDANT ACCURAY

49. All of the above paragraphs, namely 1 through 48 above, are incorporated herein by reference.

50. Claim 1 of the '619 patent defines:

1. A method of conformal radiation therapy, with a radiation beam having a predetermined, constant beam intensity for treatment of a volume of tissue in a patient, the volume of tissue containing a tumor to be treated, the tumor having a total tumor

volume and a varying thickness, comprising the steps of:

- (a) directing the radiation treatment beam toward the volume of tissue;
- (b) separating the radiation treatment beam into a plurality of radiation beam segments, with at least one beam segment being disposed contiguous to at least three adjacent beam segments; and
- (c) independently modulating the beam intensity of the plurality of radiation beam segments to spatially modulate the beam intensity of the radiation treatment beam across the volume of tissue, to treat the tumor with the plurality of radiation beam segments, each radiation beam segment having a beam intensity related to the thickness of the portion of the tumor through which each radiation beam segment passes.

51. The CyberKnife® VSI System is an apparatus for use in conformal radiation therapy of a tumor and is sold to purchasers intending to use the same in a method of conformal radiation therapy with a radiation beam having a predetermined, constant beam intensity for treatment of a volume of tissue in a patient, the volume of tissue containing a tumor to be treated, the tumor having a total tumor volume and a varying thickness.

52. The CyberKnife® VSI System when used by consumers will direct the radiation treatment beam toward the volume of tissue.

53. In operation the CyberKnife® VSI System will separate the radiation treatment beam into a plurality of radiation beam segments, or perform equivalent steps, wherein at least one beam segments or portions is disposed contiguous to at least three adjacent beam segments, or equivalent thereto.

54. In operation the CyberKnife® VSI System independently modulates the beam intensity of the plurality of radiation beam segments to spatially modulate the beam

intensity of the radiation treatment beam across the volume of tissue, to treat the tumor with the plurality of radiation beam segments, or performs equivalent method steps.

55. The CyberKnife® VSI System provides that each radiation beam segment or portion having a beam intensity related to the thickness of the portion of the tumor through which each radiation beam segment passes, or an equivalent thereto.

56. The use of the CyberKnife® VSI System by the purchasers of this system from Defendant Accuray infringes at least claim 1 of the Plaintiff's '619 patent.

57. 35 U.S.C. § 271 (b) and (c) defines “(b) Whoever actively induces infringement of a patent shall be liable as an infringer.” And “(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination, or composition, or a material or 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, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.”

58. The CyberKnife® VSI System not a staple article or commodity of commerce suitable for substantial noninfringing use outside of the scope of the '619 patent.

59. The sale of the CyberKnife® VSI System by Defendant Accuray is inducing infringement of the '619 patent by purchasers thereof. Defendant Accuray is liable under at least 35 U.S.C. § 271 (b) and/or (c) for indirect infringement of the '619 patent for the sale of the CyberKnife® VSI System.

60. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Accuray to stop the

marketing, manufacture and sale of CyberKnife VSI, and any other Accuray product employing IMRT technology as claimed in the '619 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- a. Declaring that United States Letters Patent of the '619 patent was duly and legally issued, is valid and is enforceable;
- b. Declaring that Defendant Accuray has induced infringement of and/or is a contributory infringer of one or more claims of the '619 patent;
- c. Declaring that Defendant Accuray has willfully infringed one or more claims of the '619 patent;
- d. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable attorney fees, expenses and costs in this action; and
- e. Permanently enjoining Defendant Accuray and its respective officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '619 patent pursuant to 35 U.S.C. § 283;
- f. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- g. Awarding Plaintiff its costs in connection with this action; and
- h. Damages be increased three times the amount found or accessed

due to the Defendants' willful infringement.

- i. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 3 - Defendants Hill, Scherch, Spellman and Bittman

INDUCEMENT BY DEFENDANTS HILL, SCHERCH, SPELLMAN AND BITTMAN TO INFRINGE THE '619 PATENT BY THE SALE OF CYBERKNIFE® VSI SYSTEM BY DEFENDANT ACCURAY

61. All of the above paragraphs, namely 1 through 60 above, are incorporated herein by reference.

62. Defendants Hill, Scherch, Spellman and Bittman were instrumental in the design and implementation of the CyberKnife® VSI System of Defendant Accuray.

63. Defendants Hill, Scherch, Spellman and Bittman utilized their knowledge of the '619 patent and the patented IMRT technology gleaned in their employment at Plaintiff in the design and implementation of the CyberKnife® VSI System of Defendant Accuray.

64. Defendants Hill, Scherch, Spellman and Bittman utilized materials stolen from Plaintiff relating to the '619 patent and the patented IMRT technology in the design and implementation of the CyberKnife® VSI System of Defendant Accuray.

65. In actions both before and after they began employment with Accuray, Defendants Hill, Scherch, Spellman and Bittman induced Accuray to develop, market and sell the infringing CyberKnife® VSI System.

66. Under the circumstances, the Plaintiff seeks injunctive relief, damages,

attorney's fees and costs from and against the said Defendant Hill, Scherch, Spellman and Bittman to stop assisting in any manner in the marketing, manufacture use, sale or offer for sale of the CyberKnife VSI product, and any other Accuray product employing IMRT technology as claimed in the '619 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- a. Declaring that United States Letters Patent of the '619 patent was duly and legally issued, is valid and is enforceable;
- b. Declaring that Defendants Hill, Scherch, Spellman and Bittman have induced infringement of one or more claims of the '619 patent;
- c. Declaring that Defendants Hill, Scherch, Spellman and Bittman have willfully infringed the '619 patent;
- d. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable attorney fees, expenses and costs in this action; and
- e. Permanently enjoining Defendants Hill, Scherch, Spellman and Bittman from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '619 patent pursuant to 35 U.S.C. § 283;
- f. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- g. Awarding Plaintiff its costs in connection with this action; and
- h. Damages be increased three times the amount found or accessed

due to the Defendants' willful infringement.

- i. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 4- Defendants Hill, Scherch, Spellman and Bittman

DIRECT INFRINGEMENT OF THE '619 PATENT BY THE SALE OF THE PLAINTIFF'S PATENTED DEVICE BY DEFENDANTS HILL, SCHERCH, SPELLMAN AND BITTMAN

67. All of the above paragraphs, namely 1 through 66 above, are incorporated herein by reference.

68. After Defendant Hill's departure from employment with Plaintiff, he downloaded confidential, proprietary intellectual property and trade secrets of Plaintiff from Plaintiff's computers, without Plaintiff's knowledge or consent. Defendants Scherch, Spellman and Bittman also downloaded material from Plaintiff without Plaintiff's knowledge or consent. This material is collectively referred to as Plaintiff's Stolen Material.

69. The Plaintiff's Stolen Material describes the plaintiff's patented products produced under the '619 patent. Devices made and used in accordance with the details of the Plaintiff's Stolen Material fall under all or substantially all of the claims of the Plaintiff's own '619 patent and are a direct infringement of the '619 patent if not made under the authority of Plaintiff. Hereinafter for this count these devices are referenced as patented devices.

70. The Defendants Hill, Scherch, Spellman and Bittman converted the

Plaintiffs Stolen Material in part to assist themselves in their future employment.

71. The Defendants Hill, Scherch, Spellman and Bittman offered the patented device as described in the Plaintiff's Stolen Material to Accuray in exchange for employment with Accuray. The Plaintiff's Stolen Material describing the patented device was, in part, a basis of employment of the Defendants Hill, Scherch, Spellman and Bittman with Accuray.

72. The Defendants Hill, Scherch, Spellman and Bittman by offering for sale of the patented device described in the Plaintiff's Stolen Material to Accuray, and the subsequent sale of such material which occurred through the employment of Defendants Hill, Scherch, Spellman and Bittman with Accuray are direct infringers of the '619 patent under at least 35 U.S.C. § 271 (a).

73. Pursuant to 35 U.S.C. § 287 (a) the filing of this action for infringement is notice to the infringer of infringement of the '619 patent. Further the Plaintiff sent written notice that the offer for sale, sale and use of the Plaintiff's patented device in the Plaintiff's Stolen Material is an infringement of the '619 patent in a letter dated December 16, 2010.

74. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Hill, Scherch, Spellman and Bittman to stop assisting in any manner in the marketing, manufacture use, sale or offer for sale of the Plaintiff's patented device as claimed in the '619 patent as set forth in the Plaintiff's Stolen Material.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- a. Declaring that United States Letters Patent of the '619 patent was duly and legally issued, is valid and is enforceable;
- b. Declaring that Defendants Hill, Scherch, Spellman and Bittman have infringed of one or more claims of the '619 patent;
- c. Declaring that Defendants Hill, Scherch, Spellman and Bittman have willfully infringed the '619 patent;
- d. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable attorney fees, expenses and costs in this action; and
- e. Permanently enjoining Defendants Hill, Scherch, Spellman and Bittman from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '619 patent pursuant to 35 U.S.C. § 283;
- f. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- g. Awarding Plaintiff its costs in connection with this action; and
- h. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- i. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 5- Defendants Hill, Scherch, Spellman and Bittman

CONTRIBUTORY INFRINGEMENT OF THE '619 PATENT BY THE SALE
OF THE PLAINTIFF'S PATENTED DEVICE BY DEFENDANTS HILL, SCHERCH,
SPELLMAN AND BITTMAN

75. All of the above paragraphs, namely 1 through 74 above, are incorporated herein by reference.

76. The use of the patented device described in the Plaintiff's Stolen Material infringes at least claim 1, and substantially all of the method claims, of the Plaintiff's '619 patent.

77. The patented device described in the Plaintiff's Stolen Material is not a staple article or commodity of commerce suitable for substantial noninfringing use outside of the scope of the '619 patent.

78. The patented device described in the Plaintiff's Stolen Material has been made by Accuray and such a device includes but may not be limited to the CyberKnife VSI product.

79. The sale of the patented device described in the Plaintiff's stolen material by Defendants Hill, Scherch, Spellman and Bittman to Accuray is inducing infringement of and/or contributory infringement of the '619 Patent.

80. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the Defendants Hill, Scherch, Spellman and Bittman to stop the marketing, manufacture and sale of patented device described in the Plaintiff's Stolen Material as claimed in the '619 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- a. Declaring that United States Letters Patent of the '619 patent was duly and legally issued, is valid and is enforceable;
- b. Declaring that Defendants Hill, Scherch, Spellman and Bittman

have induced infringement of and/or is a contributory infringer of one or more claims of the '619 patent;

- c. Declaring that Defendants Hill, Scherch, Spellman and Bittman have willfully infringed one or more claims of the '619 patent;
- d. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable attorney fees, expenses and costs in this action; and
- e. Permanently enjoining Defendants Hill, Scherch, Spellman and Bittman from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '619 patent pursuant to 35 U.S.C. § 283;
- f. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- g. Awarding Plaintiff its costs in connection with this action; and
- h. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- i. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 6- Defendant Accuray

INDUCEMENT BY ACCURAY TO INFRINGE THE '619 PATENT BY THE SALE OF THE PLAINTIFF'S PATENTED DEVICE BY DEFENDANTS HILL, SCHERCH, SPELLMAN AND BITTMAN

81. All of the above paragraphs, namely 1 through 80 above, are incorporated

herein by reference.

82. Defendant Accuray was instrumental in having Defendants Hill, Scherch, Spellman and Bittman obtain, offer for sale and sell the Plaintiff's Stolen Material that describes the Plaintiffs patented device.

83. Defendant Accuray encouraged and actively induced Defendants Hill, Scherch, Spellman and Bittman to obtain, offer for sale and sell the Plaintiff's Stolen Material that describes the Plaintiffs patented device.

84. Defendants Accuray is liable for inducement to infringe the '619 patent for inducing the Defendants Hill, Scherch, Spellman and Bittman to commit actions under counts 4-5 above.

85. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Accuray to stop assisting in any manner in the marketing, manufacture use, sale or offer for sale of the patented device described in the Plaintiff's Stolen Material as claimed in the '619 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- a. Declaring that United States Letters Patent of the '619 patent was duly and legally issued, is valid and is enforceable;
- b. Declaring that Defendant Accuray has induced infringement of one or more claims of the '619 patent;
- c. Declaring that Defendant Accuray has willfully infringed the '619 patent;
- d. Deeming this to be an "exceptional" case within the meaning of 35

U.S.C. § 285, entitling Plaintiff to an award if its reasonable attorney fees, expenses and costs in this action; and

- e. Permanently enjoining Defendant Accuray from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '619 patent pursuant to 35 U.S.C. § 283;
- f. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- g. Awarding Plaintiff its costs in connection with this action; and
- h. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- i. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 7 –Defendant Accuray

CONTRIBUTORY INFRINGEMENT OF THE '175 PATENT BY THE
CYBERKNIFE® VSI SYSTEM SOLD BY DEFENDANT ACCURAY

86. All of the above paragraphs, namely 1 through 85 above, are incorporated herein by reference.

87. Independent claims 1, 11, 13 and 19 of the '175 patent define:

1. A method of determining a radiation beam arrangement, the method comprising the steps of: receiving prescription parameters for a patient target; and evaluating a cost function for each of a set of a plurality of candidate intensity maps formed responsive to the prescription parameters to provide control of a trade-off between treatment plan delivery efficiency and dosimetric fitness within an optimizer to optimize a radiation

treatment plan within a continuum between substantially optimal dosimetric fitness and enhanced delivery efficiency at an expense of dosimetric fitness, the cost function including a dosimetric cost term representing dosimetric cost and related to dosimetric fitness of the respective candidate intensity map and a delivery cost term representing delivery cost and related to delivery time to deliver radiation according to a beam arrangement represented by the respective candidate intensity map, the evaluation of the delivery cost term for each respective candidate intensity map having linear computational complexity with respect to size of the respective candidate intensity map.

11. A method of providing control of a trade-off between treatment plan delivery efficiency and dosimetric fitness to optimize a radiation treatment plan within a continuum between delivery efficiency and dosimetric fitness, the method comprising the steps of: applying prescription parameters to each of a plurality of optimization algorithms within an optimizer, the plurality of optimization algorithms including a local optimization algorithm and a global optimization algorithm, the local optimization algorithm providing greater delivery efficiency than that of the global optimization algorithm, the global optimization algorithm providing greater dosimetric fitness than the local optimization algorithm; and selecting one of the plurality of algorithms to be the optimizer responsive to a user selection between enhanced delivery efficiency and enhanced dosimetric fitness.

13. A method of providing control of a trade-off between treatment plan delivery efficiency and dosimetric fitness to optimize a radiation treatment plan within a continuum between delivery efficiency and dosimetric fitness, the method comprising the steps of: assigning a delivery cost term within an optimizer to each of a plurality of intensity maps representing a potential radiation beam arrangement, the assignment based

on complexity of each respective intensity map; and evaluating an objective cost function for each of the plurality of intensity maps, the objective function including a dosimetric cost term and the delivery cost term, the dosimetric cost term representing dosimetric fitness of the respective intensity map and the delivery cost term representing delivery efficiency.

19. A method of providing control of a trade-off between treatment plan delivery efficiency and dosimetric fitness to optimize a radiation treatment plan within a continuum between delivery efficiency and dosimetric fitness, the method comprising the steps of: evaluating an objective cost function within an optimizer for each of a plurality of intensity maps, the objective function including a dosimetric cost term and the delivery cost term, the delivery cost term representing total monitor units to deliver radiation according to a beam arrangement represented by the respective intensity map; and rejecting each intensity map resulting in the delivery cost term exceeding a preselected threshold value.

88. The CyberKnife® VSI System is an apparatus for use in conformal radiation therapy of a tumor and is sold to purchasers intending to use the same in a method of conformal radiation therapy. In operation the CyberKnife® VSI System includes a method of determining a radiation beam arrangement and a method of optimizing a treatment plan.

89. The CyberKnife® VSI System when used by consumers will perform method steps including all of the steps, or equivalents thereof, of at least one of the independent claims 1, 11, 13 and 19 of the '175 patent.

90. The use of the CyberKnife® VSI System by the purchasers of this system from Defendant Accuray infringes at least one independent claim of the Plaintiff's '175

patent.

91. The CyberKnife® VSI System not a staple article or commodity of commerce suitable for substantial noninfringing use outside of the scope of the ‘175 patent.

92. The sale of the CyberKnife® VSI System by Defendant Accuray is inducing infringement of the ‘175 patent by purchasers thereof. Defendant Accuray is liable under at least 35 U.S.C. § 271 (b) and/or (c) for indirect infringement of the ‘175 patent for the sale of the CyberKnife® VSI System.

93. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney’s fees and costs from and against the said Defendant Accuray to stop the marketing, manufacture and sale of CyberKnife VSI, and any other Accuray product employing IMRT technology as claimed in the ‘175 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- j. Declaring that United States Letters Patent of the ‘175 patent was duly and legally issued, is valid and is enforceable;
- k. Declaring that Defendant Accuray has induced infringement of and/or is a contributory infringer of one or more claims of the ‘175 patent;
- l. Declaring that Defendant Accuray has willfully infringed one or more claims of the ‘175 patent;
- m. Deeming this to be an “exceptional” case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award if its reasonable

attorney fees, expenses and costs in this action; and

- n. Permanently enjoining Defendant Accuray and its respective officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '175 patent pursuant to 35 U.S.C. § 283;
- o. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- p. Awarding Plaintiff its costs in connection with this action; and
- q. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- r. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 8 - Defendants Hill, Scherch, Spellman and Bittman

INDUCEMENT BY DEFENDANTS HILL, SCHERCH, SPELLMAN AND BITTMAN TO INFRINGE THE '175 PATENT BY THE SALE OF CYBERKNIFE® VSI SYSTEM BY DEFENDANT ACCURAY

94. All of the above paragraphs, namely 1 through 93 above, are incorporated herein by reference.

95. Defendants Hill, Scherch, Spellman and Bittman utilized their knowledge of the '175 patent and the patented technology gleaned in their employment at Plaintiff in the design and implementation of the CyberKnife® VSI System of Defendant Accuray.

96. Defendants Hill, Scherch, Spellman and Bittman utilized materials stolen from Plaintiff relating to the '175 patent and the patented IMRT technology in the design and implementation of the CyberKnife® VSI System of Defendant Accuray.

97. In actions both before and after they began employment with Accuray, Defendants Hill, Scherch, Spellman and Bittman induced Accuray to develop, market and sell the infringing CyberKnife® VSI System.

98. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Hill, Scherch, Spellman and Bittman to stop assisting in any manner in the marketing, manufacture use, sale or offer for sale of the CyberKnife VSI product, and any other Accuray product employing technology as claimed in the '175 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- j. Declaring that United States Letters Patent of the '175 patent was duly and legally issued, is valid and is enforceable;
- k. Declaring that Defendants Hill, Scherch, Spellman and Bittman have induced infringement of one or more claims of the '175 patent;
- l. Declaring that Defendants Hill, Scherch, Spellman and Bittman have willfully infringed the '175 patent;
- m. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable attorney fees, expenses and costs in this action; and

- n. Permanently enjoining Defendants Hill, Scherch, Spellman and Bittman from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '175 patent pursuant to 35 U.S.C. § 283;
- o. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- p. Awarding Plaintiff its costs in connection with this action; and
- q. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- r. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 9 – Defendant Accuray

DIRECT INFRINGEMENT OF THE '283 PATENT BY THE CYBERKNIFE®
VSI SYSTEM SOLD BY DEFENDANT ACCURAY

99. All of the above paragraphs, namely 1 through 98 above, are incorporated herein by reference.

100. Independent claims 25, 29 and 36 of the '283 patent define:

25. An apparatus for determining an optimized radiation beam arrangement for applying radiation to a tumor target volume while minimizing radiation of a structure volume in a patient, comprising: a computer, adapted to computationally obtain a proposed radiation beam arrangement, the computer further adapted to computationally change the proposed radiation beam arrangement iteratively, wherein the proposed radiation beam arrangement is changed by changing the beam weights, the computer further adapted to incorporate a cost function at each iteration to approach correspondence of partial volume

data associated with the proposed radiation beam arrangement to partial volume data associated with a pre-determined desired dose prescription, and the computer further adapted to reject the change of the proposed radiation beam arrangement if the change of the proposed radiation beam arrangement leads to a lesser correspondence to the desired dose prescription and to accept the change of the proposed radiation beam arrangement if the change of the proposed radiation beam arrangement leads to a greater correspondence to the desired dose prescription to obtain an optimized radiation beam arrangement.

29. An apparatus for determining an optimized radiation beam arrangement for applying radiation to a tumor target volume while minimizing radiation of a structure volume in a patient, comprising a computer, including:

means for computationally obtaining a proposed radiation beam arrangement;

means for computationally changing the proposed radiation beam arrangement iteratively, wherein the means for computationally changing the proposed radiation beam arrangement includes a means for changing the beam weights;

means for incorporating a cost function at each iteration to approach correspondence of partial volume data associated with the proposed radiation beam arrangement to partial volume data associated with a predetermined desired dose prescription; and

means for rejecting the change of the proposed radiation beam arrangement if the change of the proposed radiation beam arrangement leads to a lesser correspondence to the desired dose prescription and accepting the change of the proposed radiation beam arrangement if the change of the proposed radiation beam arrangement leads to a greater correspondence to the desired dose prescription to obtain an optimized radiation beam arrangement.

36. An apparatus for determining an optimized radiation beam arrangement for applying

radiation to a tumor target volume while minimizing radiation of a structure volume in a patient, comprising: a computer, adapted to computationally obtain a proposed radiation beam arrangement; the computer further adapted to computationally change the proposed radiation beam arrangement iteratively, wherein the proposed radiation beam arrangement is changed by changing the beam weights, the computer further adapted to incorporate a cost function at each iteration to approach correspondence of partial volume data associated with the proposed radiation beam arrangement to partial volume data associated with a pre-determined desired dose prescription, and the computer further adapted to reject the change of the proposed radiation beam arrangement if the change of the proposed radiation beam arrangement leads to a lesser correspondence to the desired dose prescription and to accept the change of the proposed radiation beam arrangement if the change of the proposed radiation beam arrangement leads to a greater correspondence to the desired dose prescription to obtain an optimized radiation beam arrangement.

101. The CyberKnife® VSI System is an apparatus for use in conformal radiation therapy of a tumor and includes structure for determining an optimized radiation beam arrangement for applying radiation to a tumor target volume while minimizing radiation of a structure volume in a patient.

102. The CyberKnife® VSI System includes a system for determining an optimized radiation beam arrangement including all of the elements, or an equivalent thereto, of at least one of claims 25, 29 and 36 of the '283 patent.

103. The manufacture, use, sale or offer for sale of the CyberKnife® VSI System infringes at least one of at least one of claims 25, 29 and 36 of the '283 patent and is a direct infringement under at least 35 U.S.C. § 271 (a).

104. Pursuant to 35 U.S.C. § 287 (a) the filing of this action for infringement is

notice to the infringer of infringement of the '283 patent. Further the Plaintiff sent written notice that the marketing, use, manufacture and sale of the CyberKnife® VSI product is an infringement of the '283 patent in a letter dated December 16, 2010.

105. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Accuray to stop the marketing, manufacture and sale of CyberKnife VSI, and any other Accuray product employing this patented technology as claimed in the '283 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- j. Declaring that United States Letters Patent of the '283 patent was duly and legally issued, is valid and is enforceable;
- k. Declaring that Defendant Accuray has directly infringed one or more claims of the '283 patent;
- l. Declaring that Defendant Accuray has willfully infringed one or more claims of the '283 patent;
- m. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable attorney fees, expenses and costs in this action; and
- n. Permanently enjoining Defendant Accuray and its respective officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from committing further acts of infringement under 35 U.S.C. § 271 of

any claims of '283 patent pursuant to 35 U.S.C. § 283;

- o. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- p. Awarding Plaintiff its costs in connection with this action; and
- q. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- r. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 10 –Defendant Accuray

CONTRIBUTORY INFRINGEMENT OF THE '283 PATENT BY THE
CYBERKNIFE® VSI SYSTEM SOLD BY DEFENDANT ACCURAY

106. All of the above paragraphs, namely 1 through 105 above, are incorporated herein by reference.

107. Independent Claims 1, 14, 18, 33 and 40 of the '283 patent defines a method of determining optimized radiation beam arrangement for applying radiation to at least one tumor target volume while minimizing radiation of at least one structure volume in a patient.

108. The CyberKnife® VSI System is an apparatus for use in conformal radiation therapy of a tumor and is sold to purchasers intending to use the same in a method of conformal radiation therapy with a method of determining optimized radiation beam arrangement for applying radiation to at least one tumor target volume while minimizing radiation of at least one structure volume in a patient in accordance with at least one of claims 1, 14, 18, 33 and 40 of the '283 patent.

109. The CyberKnife® VSI System when used by consumers will infringes at

least one of claims 1, 14, 18, 33 and 40 of the '283 patent.

110. The CyberKnife® VSI System not a staple article or commodity of commerce suitable for substantial noninfringing use outside of the scope of the '283 patent.

111. The sale of the CyberKnife® VSI System by Defendant Accuray is inducing infringement of the '283 patent by purchasers thereof. Defendant Accuray is liable under at least 35 U.S.C. § 271 (b) and/or (c) for indirect infringement of the '283 patent for the sale of the CyberKnife® VSI System.

112. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Accuray to stop the marketing, manufacture and sale of CyberKnife VSI, and any other Accuray product employing IMRT technology as claimed in the '283 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- s. Declaring that United States Letters Patent of the '283 patent was duly and legally issued, is valid and is enforceable;
- t. Declaring that Defendant Accuray has induced infringement of and/or is a contributory infringer of one or more claims of the '283 patent;
- u. Declaring that Defendant Accuray has willfully infringed one or more claims of the '283 patent;
- v. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable

attorney fees, expenses and costs in this action; and

- w. Permanently enjoining Defendant Accuray and its respective officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '283 patent pursuant to 35 U.S.C. § 283;
- x. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- y. Awarding Plaintiff its costs in connection with this action; and
- z. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- aa. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 11 - Defendants Hill, Scherch, Spellman and Bittman

INDUCEMENT BY DEFENDANTS HILL, SCHERCH, SPELLMAN AND BITTMAN TO INFRINGE THE '283 PATENT BY THE SALE OF CYBERKNIFE® VSI SYSTEM BY DEFENDANT ACCURAY

113. All of the above paragraphs, namely 1 through 112 above, are incorporated herein by reference.

114. Defendants Hill, Scherch, Spellman and Bittman utilized their knowledge of the '283 patent and the patented IMRT technology gleaned in their employment at Plaintiff in the design and implementation of the CyberKnife® VSI System of Defendant

Accuray.

115. Defendants Hill, Scherch, Spellman and Bittman utilized materials stolen from Plaintiff relating to the '283 patent and the patented IMRT technology in the design and implementation of the CyberKnife® VSI System of Defendant Accuray.

116. In actions both before and after they began employment with Accuray, Defendants Hill, Scherch, Spellman and Bittman induced Accuray to develop, market and sell the infringing CyberKnife® VSI System which infringes upon the '283 patent.

117. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Hill, Scherch, Spellman and Bittman to stop assisting in any manner in the marketing, manufacture use, sale or offer for sale of the CyberKnife VSI product, and any other Accuray product employing patented technology as claimed in the '283 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- s. Declaring that United States Letters Patent of the '283 patent was duly and legally issued, is valid and is enforceable;
- t. Declaring that Defendants Hill, Scherch, Spellman and Bittman have induced infringement of one or more claims of the '283 patent;
- u. Declaring that Defendants Hill, Scherch, Spellman and Bittman have willfully infringed the '283 patent;
- v. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable

attorney fees, expenses and costs in this action; and

- w. Permanently enjoining Defendants Hill, Scherch, Spellman and Bittman from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '283 patent pursuant to 35 U.S.C. § 283;
- x. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- y. Awarding Plaintiff its costs in connection with this action; and
- z. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- aa. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 12- Defendants Hill, Scherch, Spellman and Bittman

DIRECT INFRINGEMENT OF THE '283 PATENT BY THE SALE OF THE PLAINTIFF'S PATENTED DEVICE BY DEFENDANTS HILL, SCHERCH, SPELLMAN AND BITTMAN

118. All of the above paragraphs, namely 1 through 117 above, are incorporated herein by reference.

119. The Plaintiff's Stolen Material describes the plaintiff's patented products produced under the '283 patent. Devices made and used in accordance with the details of the Plaintiff's Stolen Material fall under all or substantially all of the claims of the Plaintiff's own '283 patent and are a direct infringement of the '283 patent if not made under the authority of Plaintiff. Hereinafter for this count these devices are referenced as

patented devices.

120. The Defendants Hill, Scherch, Spellman and Bittman by offering for sale of the patented device described in the Plaintiff's Stolen Material to Accuray, and the subsequent sale of such material which occurred through the employment of Defendants Hill, Scherch, Spellman and Bittman with Accuray are direct infringers of the '283 patent under at least 35 U.S.C. § 271 (a).

121. Pursuant to 35 U.S.C. § 287 (a) the filing of this action for infringement is notice to the infringer of infringement of the '283 patent. Further the Plaintiff sent written notice that the offer for sale, sale and use of the Plaintiff's patented device in the Plaintiff's Stolen Material is an infringement of the '283 patent in a letter dated December 16, 2010.

122. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Hill, Scherch, Spellman and Bittman to stop assisting in any manner in the marketing, manufacture use, sale or offer for sale of the Plaintiff's patented device as claimed in the '283 patent as set forth in the Plaintiff's Stolen Material.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- j. Declaring that United States Letters Patent of the '283 patent was duly and legally issued, is valid and is enforceable;
- k. Declaring that Defendants Hill, Scherch, Spellman and Bittman have infringed of one or more claims of the '283 patent;
- l. Declaring that Defendants Hill, Scherch, Spellman and Bittman

have willfully infringed the '283 patent;

- m. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable attorney fees, expenses and costs in this action; and
- n. Permanently enjoining Defendants Hill, Scherch, Spellman and Bittman from committing further acts of infringement under 35 U.S.C. § 271 of any claims of '283 patent pursuant to 35 U.S.C. § 283;
- o. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- p. Awarding Plaintiff its costs in connection with this action; and
- q. Damages be increased three times the amount found or accessed due to the Defendants' willful infringement.
- r. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

COUNT 13- Defendant Accuray

INDUCEMENT BY ACCURAY TO INFRINGE THE '283 PATENT BY THE SALE OF THE PLAINTIFF'S PATENTED DEVICE BY DEFENDANTS HILL, SCHERCH, SPELLMAN AND BITTMAN

123. All of the above paragraphs, namely 1 through 122 above, are incorporated herein by reference.

124. Defendant Accuray was instrumental in having Defendants Hill, Scherch, Spellman and Bittman obtain, offer for sale and sell the Plaintiff's Stolen Material that describes the Plaintiffs patented device.

125. Defendant Accuray encouraged and actively induced Defendants Hill, Scherch, Spellman and Bittman to obtain, offer for sale and sell the Plaintiff's Stolen Material that describes the Plaintiffs patented device.

126. Defendants Accuray is liable for inducement to infringe the '283 patent for inducing the Defendants Hill, Scherch, Spellman and Bittman to commit actions under count 11 above.

127. Under the circumstances, the Plaintiff seeks injunctive relief, damages, attorney's fees and costs from and against the said Defendant Accuray to stop assisting in any manner in the marketing, manufacture use, sale or offer for sale of the patented device described in the Plaintiff's Stolen Material as claimed in the '283 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Best Medical prays for the entry of a judgment from this Court:

- j. Declaring that United States Letters Patent of the '283 patent was duly and legally issued, is valid and is enforceable;
- k. Declaring that Defendant Accuray has induced infringement of one or more claims of the '283 patent;
- l. Declaring that Defendant Accuray has willfully infringed the '283 patent;
- m. Deeming this to be an "exceptional" case within the meaning of 35 U.S.C. § 285, entitling Plaintiff to an award of its reasonable attorney fees, expenses and costs in this action; and
- n. Permanently enjoining Defendant Accuray from committing further acts of infringement under 35 U.S.C. § 271 of any claims of

‘283 patent pursuant to 35 U.S.C. § 283;

- o. Awarding Plaintiff damages in accordance with 35 U.S.C. § 284;
- p. Awarding Plaintiff its costs in connection with this action; and
- q. Damages be increased three times the amount found or accessed due to the Defendants’ willful infringement.
- r. Awarding Plaintiff such other and further relief as this court may deem to be just and proper.

JURY TRIAL DEMANDED

Respectfully submitted,

Robert O Lampl/S
ROBERT O LAMPL, ESQUIRE
Attorney for the Plaintiff

JAMES A. ASHTON, ESQUIRE

JAMES R. COONEY, ESQUIRE

BLYNN L. SHIDELER, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

BEST MEDICAL INTERNATIONAL,
INC.,

Plaintiff,

Case No. 2:10-cv-1043

vs.

ACCURAY, INC., ROBERT HILL,
DAVID SPELLMAN, JOHN DAVID
SCHERCH, MARCUS BITTMAN,

Defendants.

CERTIFICATE OF SERVICE

I, Robert O Lampl, hereby certify that on the 16th day of December, 2010, I served true and correct copies of the foregoing **Plaintiff's Reply to Defendants' Motion to Strike pursuant to Federal R.C.P. 12(f)** upon all interested parties in this matter, by

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