

Paul Adams (Bar No. 42,146)
The Adams Law Firm, LLC
550 West C Street, Suite 2000
San Diego, California 92101
Telephone: (505) 222-3145

Michael T. Cooke
Jonathan T. Suder
Brett M. Pinkus
Friedman, Suder & Cooke
604 East 4th Street, Suite 200
Fort Worth, Texas 76102
Telephone: (817) 334-0054

Attorneys for Brain Life, LLC

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

BRAIN LIFE, LLC, a Delaware limited
liability company,

Plaintiff,

vs.

BRAINLAB, INC., a Delaware corporation,

Defendant.

Case No.: 10cv1539 CAB (BGS)

**THIRD AMENDED COMPLAINT
FOR INFRINGEMENT
OF UNITED STATES PATENT NO.
5,398,684**

JURY TRIAL DEMANDED

On January 24, 2013, this Court entered an Order granting Plaintiff leave to amend the Second Amended Complaint on or before February 11, 2013 to “sufficiently plead contributory infringement and remove allegations against dismissed parties.” (Docket No. 118)

On or about January 13, 2012, this Court severed Eleka, Inc. from this litigation and ordered Brain Life, LLC to bring a separate action against Eleka, Inc., now Civil Case No. 3:12-cv-0030-CAB-BGS. (Docket No. 69) This Third Amended Complaint in this action deletes Paragraphs 7, 13, 24 and 29-34 from the Second Amended Complaint, omitting

1 allegations as to Elekta to properly reflect the correct parties. Moreover, the actions against
 2 Defendants, Varian Medical Systems, Inc. and Medtronic, Inc. having been dismissed on
 3 October 1, 2012 (Docket No. 103) and on November 8, 2012 (Docket No. 108), respectively,
 4 this Third Amended Complaint deletes all reference in the Second Amended Complaint to those
 5 two parties. This Complaint re-alleges the claim in the Second Amended Complaint found
 6 deficient in the above-identified Order of January 24, 2013 (Docket No. 118) for indirect
 7 contributory infringement under 35 U.S.C. § 271(c).

8 **THE PARTIES**

9 1. Brain Life is a limited liability company formed and existing under the laws of
 10 Delaware with a principal place of business located at 500 Newport Center Drive, 7th Floor,
 11 Newport Beach, California 92660.

12 2. Upon information and belief, BrainLab, Inc. (“BrainLab”) is a corporation
 13 formed and existing under the laws of the State of Delaware, with a principal place of business
 14 at 3 Westbrook Corporate Center, Suite 400, Westchester, IL 60154.

15 **JURISDICTION AND VENUE**

16 3. This is a civil action for patent infringement seeking damages arising under the
 17 Patent Laws of the United States, 35 U.S.C. §§ 1, et seq. Jurisdiction is conferred upon this
 18 Court pursuant to 28 U.S.C. §§ 1331 and 1338(a).

19 4. BrainLab does business in this judicial district as set forth in detail below,
 20 including but not limited to the sale of goods and services to medical centers and other entities
 21 at which medical professionals practice various forms of surgery and oncology treatment and
 22 planning using the methods of a patent owned by Brain Life. BrainLab is subject to the
 23 personal jurisdiction of this Court and is amenable to service of process pursuant to the
 24 California long-arm statute, Cal.Civ.Proc.Code, § 413.10 and Fed.R.Civ.P. 4(c).

25 **GENERAL ALLEGATIONS**

26 5. Brain Life is the exclusive licensee of MIDCO (Medical Instrumentation and
 27 Diagnostics Corporation) by assignment in and to United States Patent No. 5,398,684 (the “‘684
 28 Patent” or “patent in suit”) entitled Method and Apparatus for Video Presentation from Scanner

1 certain apparatus claims of the patent in suit, including Claim 1. Earlier Defendants brought a
2 motion in limine to dismiss with prejudice all claims other than the apparatus claims specifically
3 asserted. On January 14, 2002 this Court dismissed all of the non-asserted claims, including all
4 of the method claims, without prejudice. Prior to the dismissal, MIDCO brought a motion for
5 summary judgment that the apparatus claims were not invalid; on November 6, 2001 this Court
6 granted the motion that the apparatus claims asserted were not invalid.

7 10. The Prior Litigation went to trial beginning January 23, 2002 and a jury found
8 that the claims of the '684 and '846 patents were infringed and since validity had been
9 established, a damage award was made by the jury in the amount of \$16,595,000.

10 11. On September 23, 2002, Earlier Defendants timely filed a Notice of Appeal and
11 the case was briefed and heard before the United States Federal Circuit Court of Appeals
12 ("Federal Circuit") (Appellate Docket No. 03-1032). The judgment of infringement and the
13 damage award were reversed on the grounds that the apparatus claims asserted had not been
14 properly construed. (*Medical Instrumentation and Diagnostics Corp, v. Elekta*, 344 F.3d 1205
15 (Fed. Cir. 2003). When construed in the manner determined by the Federal Circuit, all of the
16 apparatus claims were not infringed by the Earlier Defendants. The Federal Circuit also
17 reversed the lower court's judgment that the '684 Patent claims asserted were not invalid on the
18 grounds that a genuine issue of material fact for the jury existed. The case was then remanded
19 to the lower court for further proceedings.

20 12. On February 12, 2004, MIDCO brought a motion to amend the complaint in the
21 Prior Litigation to assert the method claims in the '684 Patent. That motion was denied by this
22 Court. MIDCO then timely filed a Notice of Appeal to the Federal Circuit and the case was
23 briefed, argued and this Court was affirmed. The date on which the Federal Circuit affirmed
24 this Court's judgment dismissing the MIDCO complaint was June 2, 2005.

25 13. As a result of the infringement by the Earlier Defendants, MIDCO could not
26 compete with other companies developing, manufacturing and selling treatment planning
27 systems for stereotactic surgery and MIDCO struggled to survive. MIDCO attempted to raise
28 funds necessary to underwrite the cost of a suit against the Earlier Defendants, including Elekta,

1 based on the method claims that had been dismissed without prejudice in the Prior Litigation.
2 Despite a showing of interest by a number of financial and legal entities, MIDCO was unable to
3 find any investor who would defray the cost of pursuing a second patent infringement case
4 against the Earlier Defendants (including Elekta) as well as a suit for patent infringement
5 against Medtronic, Varian and BrainLab.

6 14. On or about September 21, 2009, MIDCO entered into a business arrangement
7 with the present Plaintiff, Brain Life, granted an exclusive license to a company who then
8 assigned the license to Brain Life and agreed to cooperate in the negotiation of any patent
9 license and prosecution of a patent infringement suit.

10 **THE PATENTED TECHNOLOGY**

11 15. The '684 Patent discloses and claims a method for presenting a plurality of
12 scanned images in a video presentation. Scanned images are radiological images taken by
13 devices and techniques such as Computed Tomography (CT), Nuclear Magnetic Resonance or
14 Image (NMR or MRI), Digital Subtraction Angiography (DSA), Positron Emission
15 Tomography (PET) and other types of diagnostic radiological images. The '684 method
16 produces what is commonly referred to as a treatment plan, performed on computer hardware
17 and software in accordance with the present invention. The treatment plan is used in
18 performing stereotactic surgery and involves the steps of acquiring of the images, converting of
19 the images to a common format, storing of the images, manipulating and comparing of the
20 images, measuring lines, areas and volume, and selectively recalling and simultaneously
21 displaying at least two of the scanned images so as to appear in combination on a single display
22 device. At least one of the scanned images is stereotactic to provide a three-dimensional
23 reference system to enable localization of a structure-of-interest such as a tumor or implements
24 used in invasive surgery or treatment. In one embodiment of the invention, graphic brain map
25 atlas images may be imported into the treatment planning hardware and software system; the
26 graphic images may be fitted to the scanned images of the patient's brain. In addition to
27 presenting the images in two dimensions, simulated three-dimensional images including both
28 scanned and graphic images can be displayed.

1 16. The value of the method described and claimed in the ‘684 Patent is enhanced
2 visualization of the patient’s brain, it being understood that the brain is encased in the patient’s
3 skull and is not visually accessible to the surgical team, who without the benefit of the images,
4 would be forced to estimate the particular location of, for example, a tumor in the patient’s
5 brain. In particular, one advantage of the present invention is that images from different
6 scanning sources, for example, a CT-scanned image and an MR-scanned image, can be
7 combined for synchronous viewing on the screen of the hardware and software treatment
8 planning system thus offering the benefits that each individual type of scan affords. The
9 combination of images is often referred to as “fusion” images and may be rendered in various
10 ways, such as a transparency, an overlay, a technique such as flicker frame, and various other
11 types of image data-set combinations. Through the use of these fused images, and particularly
12 when used with the brain map images, a high level of precision and accuracy as to the location
13 and size of, for example, a tumor, may be achieved.

14 17. Once a structure-of-interest is localized in stereotactic space and characterized, a
15 decision may be made regarding whether to employ invasive or non-invasive neurosurgery. In
16 the case of invasive neurosurgery, the procedure involves maintaining the patient’s head in a
17 stereotactic frame or other immobilizing device so that the precise location of the structure-of-
18 interest can be identified, an appropriate opening in the patient’s skull may be made, and the
19 surgeon’s probe or a radioactive isotope may be directed to the specific location of the structure-
20 of-interest.

21 18. Alternatively, non-invasive surgery may be selected using a radiosurgery
22 apparatus, such as the GammaKnife or a radiotherapy apparatus equipped for stereotactic
23 surgery.

24 **INFRINGEMENT ACTS OF BRAINLAB**

25 19. During the period commencing with the date that is six years prior to the date of
26 filing of this Complaint, BrainLab has manufactured and/or sold certain systems comprising
27 computer hardware and/or software. BrainLab also sells various software programs (identified
28 below) independently of system sales to customers who implement the software on non-

1 BrainLab hardware. There are a variety of system families (“BrainLab Systems”) each
2 comprised of individual hardware and software products that are used for both invasive and
3 non-invasive surgery. The BrainLab Systems include: (1) navigation systems used intra-
4 operatively for invasive surgery, such as Kolibri and VectorVision (that may be integrated with
5 BrainSUITE that permits MRI or CT radiologic images to be taken during surgery); (2)
6 ExacTrac IGRT used in radiation therapy treatment (non-invasive procedures) that provide
7 frameless stereotaxy for single fraction radiosurgery; and (3) the Novalis Tx radiosurgery
8 platform using a Varian Medical Systems Linac. The software components of these BrainLab
9 Systems comprise a number of families, one of which is styled iPlan and includes at least seven
10 separate software products bearing the family name: iPlan RT Image, iPlan RT Dose, iPlan
11 Stereotaxy, iPlan ENT, iPlan Cranial, iPlan Flow and iPlan Spine. Other software components
12 of the BrainLab Systems include PatXfer (acquisition and conversion of images), BrainSCAN
13 (stereotactic treatment planning system for radiation therapy), and Cranial/ENT Essential
14 (intraoperative image guided localization).

15 20. Kolibri is a mobile platform system that includes a computer planning and
16 navigation workstation that displays images and includes localization hardware and software
17 used for navigation during invasive surgery. VectorVision is also a mobile platform system
18 with a computer planning and navigation workstation used during invasive surgery, or may be a
19 stationary ceiling-mounted system for frameless stereotaxy localization and navigation, called
20 VectorVision Sky. VectorVision may be used for frameless stereotaxy localization and
21 navigation based on treatment plans performed on the VectorVision workstation, or other
22 BrainLab workstations. BrainSUITE systems combine intra-operative MR or CT imaging with
23 stereotactic planning and navigation based on VectorVision hardware and may be used in
24 conjunction with the above-mentioned software. Digital Lightbox is a computer monitor that is
25 wall mounted for use by surgeons in or out of the operating room. ExacTrac is an automated
26 IGRT system including a patient couch (platform) and floor-mounted and ceiling-mounted
27 components of an optical infrared tracking (navigation) system for correct patient positioning
28 throughout surgery including tumor motion management. ExacTrac may be used in conjunction

1 with iPlan RT software images that are updated during the intraoperative procedure. The
2 Kolibri and VectorVision BrainLab Systems are stereotactic systems accused of infringing
3 when used with iPlan treatment planning software.

4 21. The BrainLab systems may also include graphic scanned brain images, called
5 Brain Maps, used in treatment planning and/or intra-operative navigation as additional features
6 of the System.

7 22. Brain Life accuses the BrainLab Systems of literally infringing each of the
8 limitations in each of the Asserted Claims (including the preamble if construed as a positive
9 limitation). Should the Court construe any limitation such that it is not literally infringed, Brain
10 Life contends that the limitation is infringed under the doctrine of equivalents on the grounds
11 that the differences between the limitation and the corresponding element of the BrainLab
12 Systems are insubstantial and/or the element performs substantially same function in
13 substantially the same way to obtain substantially the same result.

14 23. Direct infringement of the '684 patent occurs when a user, such as one, or any
15 combination of, a surgeon, oncologist, physicist or other treatment planning professional acting
16 in concert, uses the BrainLab System in the course of practicing at least one of the methods
17 claimed in the Asserted Claims. In addition to direct infringement by its customers, BrainLab
18 has also directly infringed the claims by practicing the method through on-call services in which
19 a BrainLab technician (agent) accompanies the BrainLab System for temporary use and
20 participates in the procedure being performed, or in the course of testing and/or demonstrating
21 BrainLab Systems.

22 24. BrainLab also infringes by active inducement of its customers for BrainLab
23 Systems and BrainLab software, to use BrainLab Systems so as to infringe the Asserted Claims.
24 BrainLab has actively and knowingly promoted and/or aided and abetted a user's direct
25 infringement of the '684 patent by, for example, advertising the use of the BrainLab Systems
26 and/or providing instructions on how to use the BrainLab Systems in a way that would infringe
27 the Asserted Claims. BrainLab's design, manufacture, and sale of BrainLab Systems used for
28 direct infringement of the Asserted Claims is further evidence of its intent to induce

1 infringement by another.

2 25. BrainLab's infringement by inducement is based, *inter alia*, on BrainLab's
3 awareness of the '684 patent, at a minimum no later than February, 2002, the date the jury
4 returned its verdict in Case No. 97-cv-2271-RHW, *Medical Instrumentation and Diagnostics*
5 *Corp. v. Elekta, AB*. In addition, BrainLab's knowledge of the '684 patent is evidenced by the
6 suit for patent infringement, brought by Medtronic, Inc. against BrainLab, on May 12, 1998
7 (Civil Action No. 98-cv-01072) based on Bucholtz U.S. Patent No. 5,383,454 that cites MIDCO
8 U.S. Patent No. 5,099,846 (the parent patent of the '684 patent in this suit) as prior art. On
9 information and belief, BrainLab in preparing its defense against the patent infringement suit by
10 Medtronic, would require competent counsel to study each of the prior art patents cited on the
11 cover page of the Bucholtz patent to assess whether the Bucholtz patent was valid. BrainLab's
12 knowledge of the '684 patent is further reflected by the fact that BrainLab and its subsidiaries
13 have obtained at least one European patent in which the MIDCO U.S. Patent No. 5,099,846 (the
14 parent patent of the '684 patent in this suit) was cited as prior art in October 2008.

15 26. Brain Life also accuses BrainLab of contributory infringement by the sale of the
16 family of treatment planning software products identified above, that are separable components
17 from the hardware products of BrainLab Systems or other hardware manufacturers.
18 Specifically, the treatment planning products that are separable components of the BrainLab
19 Systems, include but are not limited to, iPlan RT Image, iPlan RT Dose, iPlan Stereotaxy, iPlan
20 Cranial, iPlan Flow, BrainSCAN, Cranial ENT Essential and PatXfer (Contributory
21 Infringement Accused Products ("CIAP")). Each of these software components enables
22 stereotactic treatment planning when integrated with hardware components such as, but not
23 limited to, ExacTrac, VectorVision and Kolibri to perform navigation and/or frameless
24 stereotaxy. Brain Maps are additional components of the BrainLab Systems and software.
25 BrainLab knows that the above-identified treatment planning software components, when
26 executed on BrainLab hardware, as part of a BrainLab System or non-BrainLab hardware,
27 constitutes a material part of the invention of the Asserted Claims of the '684 patent, are
28 especially made for use in an infringement of the Asserted Claims of the '684 patent, and are

1 not staple articles or commodities of commerce. The CIAP cannot be used for purposes other
2 than infringement of Claim 53 of the '684 patent except possible uses that may be unusual,
3 impractical, occasional or experimental. The CIAP is not suitable for substantial non-infringing
4 use other than to perform the steps of method Claim 53 and claims dependent thereon.

5 27. By way of example of the CIAP, the iPlan Stereotaxy software is represented in
6 BrainLab customer instruction materials for use in preparing and presenting patient image data
7 based on CT, MR, and X-Ray (Fluoro) scans. The instructions provide that the iPlan Stereotaxy
8 component is used for image preparation, image fusion, and image segmentation that are steps
9 in the performance of the method of Claim 53. This iPlan software component provides a
10 treatment plan for use in stereotactic surgery. The iPlan Stereotaxy component instructions
11 direct the user to perform four of the most critical steps of method Claim 53 including
12 acquisition of images using the software component PatXfer and then conversion to a BrainLab
13 format, storing the images, performing stereotactic localization utilizing the images, and fusing
14 the images all as part of the use of accused BrainLab Systems. As another example of the
15 CIAP, BrainLab provides its customers with a software component that permits the customer to
16 perform critical steps of the Claim 53 method and also instruct the customer in the use of the
17 component for localization utilizing the Brain Map component to create registration points used
18 in determining stereotactic coordinates for the images in the operating room. Another function
19 of the iPlan software component, iPlan Stereotaxy, provides measuring and/or calculating
20 distances, volumes, and areas as well as locations in Cartesian coordinates based on the image
21 data provided by the software component. The iPlan Stereotaxy software component
22 instructions inform the user to compare images by adjusting grayscale values or by
23 pseudocoloring. The software component can also be used in a manipulating step performed by
24 shifting or adjusting one image set to a reference image set.

25 28. Use of the exemplary iPlan Stereotaxy software component is authorized in
26 instructional materials provided to customers specifying the correct use of the software
27 component, warnings of misuse, and requiring that the software component is to be used only
28 with BrainLab specified equipment. Similarly, the instructional materials of the iPlan

INDUCEMENT PATENT INFRINGEMENT BY BRAINLAB

34. Brain Life realleges and incorporates by reference Paragraphs 1 – 33 set forth above.

35. BrainLab has indirectly infringed the Asserted Claims of the ‘684 patent by inducing users of the BrainLab Systems to practice the methods of the Asserted Claims of the ‘684 patent in the United States (“Acts of Inducement”). The Acts of Inducement are set forth in greater detail in Paragraphs 24 and 25.

36. Upon information and belief, BrainLab is willfully infringing the Asserted Claims of the ‘684 patent through its Acts of Inducement performed in the United States during the period commencing six years prior to the Complaint in this action.

37. BrainLab is willfully infringing the Asserted Claims of the ‘684 patent through its Acts of Inducement that demonstrate at least an objective recklessness in performing such acts.

38. As a result of the above-described acts of indirect infringement by Acts of Inducement, Brain Life has suffered damages.

COUNT III

CONTRIBUTORY INFRINGEMENT BY BRAINLAB

39. Brain Life realleges and incorporates by reference Paragraphs 1 – 38 set forth above.

40. BrainLab has offered to sell and has sold in the United States, or imported into the United States, a software component of the BrainLab Systems for use in practicing a method that directly infringes the Asserted Claims of the ‘684 patent and that constitutes a material part of the invention, knowing the same to be especially made or adapted for use in an infringement of the Asserted Claims and not a staple article or commodity of commerce suitable for substantial non-infringing use (“Acts of Contributory Infringement”).

41. BrainLab is willfully infringing the Asserted Claims of the ‘684 patent through its Acts of Contributory Infringement that demonstrate at least an objective recklessness in performing such acts.

42. As a result of the above-described acts of indirect infringement by Acts of Contributory Infringement, Brain Life has suffered damages.

REQUEST FOR RELIEF

WHEREFORE, Brain Life respectfully requests that the Court:

A. Award Plaintiff Brain Life, LLC past damages together with prejudgment and postjudgment interest to compensate Brain Life, LLC for the infringement by BrainLab of the Asserted Claims of the '684 Patent in accordance with 35 U.S.C. § 284, and to increase such award by up to three (3) times the amount found or assessed in accordance with 35 U.S.C. § 284;

B. Declare this case exceptional and award reasonable attorneys fees to Brain Life, LLC pursuant to 35 U.S.C. § 285; and

C. Permit Brain Life, LLC to recover its costs, disbursements, attorneys' fees and such further and additional relief as is deemed appropriate by this Court.

JURY TRIAL DEMANDED

Brain Life, LLC requests a trial by jury for all claims that permit a jury trial in this action.

Dated: February 9, 2013

THE ADAMS LAW FIRM, LLC

By: /S/ Paul Adams

Paul Adams (Bar No. 42,146)
550 West C Street, Suite 2000
San Diego, California 92101
Telephone: (505) 222-3145

FRIEDMAN, SUDER & COOKE

Michael T. Cooke
Jonathan T. Suder
Brett M. Pinkus
604 East 4th Street, Suite 200
Fort Worth, Texas 76102
Telephone: (817) 334-0054

Attorneys for Brain Life, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have taken steps to cause this document to be transmitted electronically to the Electronic Case Filing (“ECF”) system of the United States District Court for the Southern District of California, constituting service of the final document to all registered participants, all of whom have consented to electronic service.

Dated this 9th day of February, 2013.

/S/ Paul Adams
Paul Adams