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**WO**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Bard Peripheral Vascular, Inc., and David Goldfarb, M.D.,	}	
Plaintiffs,		
vs.		
W.L. Gore & Associates, Inc.,		
Defendant.		
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W.L. Gore & Associates, Inc.,		
Counterclaimant,		
vs.		
Bard Peripheral Vascular, Inc., David Goldfarb, M.D., and C.R. Bard, Inc.,		
Counterdefendants.		

No. CV 03-0597-PHX-MHM

**SEALED ORDER**

Currently before the Court are Plaintiffs' Motion for Attorney Fees and Non-Taxable Costs (Dkt. #850), Plaintiffs' Motion for Enhanced Damages (Dkt. #868), Plaintiffs' Motion to Strike the Declaration of Mr. John Sininger Submitted in Opposition to Plaintiffs' Request for Enhanced Damages (Dkt. #910). After reviewing the pleadings and holding oral argument on March 30, 2009, the Court issues the following order.

1 **I. PLAINTIFFS' MOTION FOR ENHANCED DAMAGES<sup>1</sup>**

2 Plaintiffs seek enhanced treble damages for Defendant's willful infringement of  
3 the '135 Patent. (Dkt. #868).

4 A court may "increase the damages up to three times the amount found or  
5 assessed." 35 U.S.C. § 284. In order to obtain enhanced damages, "the fact-finder must  
6 determine whether an infringer is guilty of conduct upon which increased damages may  
7 be based. If so, the court then determines, exercising its sound discretion, whether, and to  
8 what extent, to increase the damages award given the totality of the circumstances."  
9 Jurgens v. CBK, Ltd., 80 F.3d 1566, 1570 (Fed. Cir. 1996); see also Read Corp. v. Portec,  
10 Inc., 970 F.2d 816, 826 (Fed. Cir. 1992) ("An award of enhanced damages for  
11 infringement, as well as the extent of the enhancement, is committed to the discretion of  
12 the trial court.") (superseded on other grounds as recognized in Hoechst Celanese Corp. v.  
13 BP Chems. Ltd., 78 F.3d 1575, 1578 (Fed. Cir. 1996)).

14 "An act of willful infringement . . . is, without doubt, sufficient to meet the first  
15 requirement to increase a compensatory damages award." Jurgens, 80 F.3d at 1570.  
16 Here, the jury was instructed, without objection, on the elements of willful infringement  
17 set forth in In re Seagate Technology, LLC, 497 F.3d 1360 (Fed. Cir. 2007) (en banc):

18 To prove willful infringement, Plaintiffs must first persuade you that Gore  
19 infringed a valid and enforceable claim of the '135 patent. . . . In addition . .  
20 . Plaintiffs must persuade you that it is highly probable that prior to the  
21 filing date of the complaint, Gore acted with reckless disregard of the  
22 claims of the '135 patent. To demonstrate such "reckless disregard," . . . .  
23 Plaintiffs must persuade you that Gore acted despite an objectively high

22 <sup>1</sup>Plaintiffs also filed a Motion to Strike the Declaration of Mr. John Sininger, which  
23 was submitted by Defendant in opposition to Plaintiffs' Motion for Enhanced Damages.  
24 (Dkt. #910). That Motion violates LRCiv 7.2(m)(2): "An objection to the admission of  
25 evidence offered in support of or opposition to a motion must be presented in the objecting  
26 party's responsive or reply memorandum . . . and not in a separate motion to strike or other  
27 separate filing. Any response to the objection must be included in the responding party's  
28 reply memorandum for the underlying motion and may not be presented in a separate  
responsive memorandum." (emphasis added). Therefore, the Court will deny Plaintiffs'  
Motion to Strike and will consider the Sininger Declaration to the extent that it is relevant  
and admissible.

1 likelihood that its actions constituted infringement of a valid and  
2 enforceable patent . . . [and] that Gore actually knew, or that it was so  
3 obvious that Gore should have known, that its actions constituted  
4 infringement of a valid and enforceable patent.

(Dkt. #769, pp. 60-61). Moreover, the Court instructed the jury, without objection, that

5 [i]n deciding whether Gore acted with reckless disregard for Plaintiffs'  
6 patent, you should consider all the facts surrounding the alleged  
7 infringement including . . . [w]hether Gore intentionally copied at least one  
8 of Plaintiffs' products covered by the patent[,] and . . . [w]hether Gore  
9 relied on a legal opinion that was well-supported and believable and that  
10 advised Gore (1) that the products did not infringe Plaintiffs' patent or (2)  
11 that the patent was invalid."

12 (Id., p.61). The jury returned a verdict for Plaintiffs on all counts and claims, rejecting  
13 Gore's myriad infringement defenses and finding, among other things, "that it is highly  
14 probable that Gore's infringement . . . was willful." (Dkt. #772, p.20). The jury thus  
15 determined as a factual matter that Defendant acted with the requisite culpability to  
16 justify an award of increased damages, and, as discussed above, there was substantial  
17 evidence to support the jury's determination. Accordingly, the jury's finding is sufficient  
18 to meet the first requirement for the imposition of enhanced damages pursuant to 35  
19 U.S.C. § 284.

20 However, "a finding of willful infringement does not mandate that damages be  
21 enhanced, much less mandate treble damages." Read, 970 F.2d at 826. But if the jury  
22 does find that the defendant willfully infringed the patent-in-suit, "the Court must provide  
23 reasons for not increasing a damages award." Informatica Corp. v. Business Objects Data  
24 Integration, Inc., 489 F.Supp.2d 1075, 1084 (N.D. Cal. 2007) (citing Jurgens, 80 F.3d at  
25 1572).

26 "The paramount determination in deciding to grant enhancement and the amount  
27 thereof is the egregiousness of the defendant's conduct based on all the facts and  
28 circumstances." Read, 970 F.2d at 826; accord Informatica, 489 F.Supp.2d at 1084 ("If  
the Court decides to enhance damages, the Court looks to the totality of circumstances  
and considers the egregiousness of the defendant's conduct as well as factors that are  
mitigating or ameliorating to set the amount of enhancement."). To assist courts "when

1 determining whether an infringer has acted in bad faith and whether damages should be  
2 increased,” the Federal Circuit has identified a list of several, non-exhaustive factors (“the  
3 Read factors”) to consider:

4 (1) whether the infringer deliberately copied the ideas or design of another;  
5 (2) whether the infringer, when he knew of the other’s patent protection,  
6 investigated the scope of the patent and formed a good-faith belief that it  
7 was invalid or that it was not infringed; (3) the infringer’s behavior as a  
8 party to the litigation; (4) defendant’s size and financial condition; (5)  
9 closeness of the case; (6) duration of defendant’s misconduct; (7) remedial  
10 action by the defendant; (8) defendant’s motivation for harm; (9) whether  
11 defendant attempted to conceal its misconduct.

12 Liquid Dynamics Corporation v. Vaughan Company, Inc., 449 F.3d 1209, 1225 (Fed. Cir.  
13 2006) (internal quotations and alterations omitted) (citing Read, 970 F.2d 826-27). In  
14 support of their Motion, Plaintiffs argue that “each and every factor demonstrates that, on  
15 balance, Plaintiffs are overwhelmingly entitled to [enhanced] damages.” (Dkt. #868, p.5).  
16 Defendant concedes no factor: “[N]one of these factors weigh in favor of enhancement of  
17 damages.” (Dkt. #884, p.1).<sup>2</sup>

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20 **A. Deliberate Copying**

21 The first Read factor is whether Defendant deliberately copied the ideas or design  
22 embodied in the ‘135 patent. Defendant argues that “Plaintiffs presented no evidence at  
23 trial that Gore committed acts of copying during the seven month period after the grant of  
24 the Goldfarb patent.” (Dkt. #884, p.3).

25 First, however, in its instructions the Court expressly asked the jury to consider  
26 whether Defendant intentionally copied any of the products embodied in the ‘135 patent.  
27 After weighing the evidence, the jury rejected all of Defendant’s invalidity defenses and  
28 returned a verdict for Plaintiffs on all counts and claims, including willful infringement.  
Considering the detailed jury instructions, the only way that the jury could have reached

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<sup>2</sup>Defendant continues that “[t]o the contrary, [the Read factors] call into question the jury’s willfulness verdict itself, which Gore asked the Court to carefully review and overturn in its JMOL/New Trial Motion.” (Dkt. #884, p.1). As discussed in its July 29, 2008 Order, the Court denied Defendant’s JMOL to overturn the jury’s verdict on willful infringement. (Dkt. #833, pp. 3-4).

1 its verdict was to find that Defendant intentionally copied the products covered by the  
2 '135 patent. See Voda v. Cordis Corp., 506 F.Supp.2d 868, 877 (W.D. Okla. 2007) (“[A]  
3 finding of conscious copying is inherent in the jury’s finding of willfulness.”); see also  
4 Perkin-Elmer Corp. v. Computer Vision Corp., 732 F.3d 888, 893 (Fed Cir. 1984) (“[T]he  
5 law presumes the existence of findings necessary to support the verdict the jury  
6 reached.”). Thus, the first factor is met, and the Court “does not have the discretion to  
7 reweigh th[e] evidence once the matter has been decided by the jury.” Jurgens, 80 F.3d at  
8 1572.

9         Second, as discussed in its July 29, 2008 Order, the Court has already found that  
10 “the trial record in this case provides sufficient evidence for the jury to have found willful  
11 infringement by clear and convincing evidence.” (Dkt. #833, p.4). As such, there was  
12 sufficient evidence of post-issuance copying to support the jury’s verdict.<sup>3</sup> The jury  
13 found that Defendant’s original ePTFE microstructure was an intentional copy of Dr.  
14 Goldfarb’s structure, as embodied in the ‘135 patent. And the evidence presented at trial  
15 established that Defendant’s post-issuance infringing products contain the same or similar  
16 ePTFE microstructure as Defendant’s original ePTFE vascular grafts. See PX-414.24,  
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18         <sup>3</sup>While “[a] jury verdict of willfulness . . . does not bar a district court from  
19 determining the egregiousness of a willful infringer’s conduct,” Electro Scientific Industries,  
20 Inc. v. General Scanning Inc., 247 F.3d 1341, 1354 (Fed. Cir. 2001), “the district court must  
21 take care to avoid second guessing the jury or contradicting its findings,” Applied Medical  
22 Resources Corp. v. United States Surgical Corp., 967 F.Supp. 861, 863 (E.D. Va. 1997).  
23 Thus, despite Defendant’s contention to the contrary, once a jury has weighed evidence and  
24 made a determination therefrom, the Court may not reweigh that evidence; it may only  
25 examine the evidence to determine whether, and to what extent, the jury’s determination was  
26 or was not supported by the evidence presented. See, e.g., Acumed LLC v. Stryker Corp.,  
27 483 F.3d 800, 811 (Fed. Cir. 2007) (“Willfulness is ‘not an all-or-nothing trait, but one of  
28 degree.’”) (quoting Comark Commc’ns v. Harris Corp., 156 F.3d 1182, 1190 (Fed. Cir.  
1998)); Jurgens, 80 F.3d at 1572 (“[A district court] does not have discretion to reweigh th[e]  
evidence once the matter has been decided by the jury and the court finds the evidence  
sufficient to support the jury determination.”); Forro Precision, Inc. V. Int’l Bus. Machs.  
Corp., 673 F.2d 1045, 1058 (9th Cir. 1982) (“[A district court] must accept as true facts that  
necessarily were established by the jury’s verdicts.”).

1 PX-1547.2154; 11/29/07 Tr. at 2348:14-24, 2349:12-19. Accordingly, Defendant's post-  
2 issuance infringing products, which admittedly contain the same or similar ePTFE  
3 microstructure as Defendant's original ePTFE vascular grafts, establish that Defendant  
4 committed, and continues to commit, acts of copying after the grant of the '135 patent.

5       There is also pre-issuance evidence that Defendant deliberately copied Dr.  
6 Goldfarb's invention. See, e.g., Minn. Mining & Manufacturing Co. v. Johnson &  
7 Johnson Orthopaedics, Inc., 976 F.2d 1559, 1581 (Fed. Cir. 1992) ("[P]re-patent conduct  
8 may also be used to support a finding of willfulness."); Jepson, Inc. v. Makita USA, Inc.,  
9 1994 U.S. Dist. LEXIS 21622, at \*17 (C.D. Cal. 1994) ("Pre-patent copying shows that  
10 the infringer's sales after it receives notice of the patent were intentional and deliberate,  
11 in willful disregard of the patentee's rights and belies any contention that the post-notice  
12 sales were made with a good-faith belief that there was no infringement."). The evidence  
13 includes, among other things, that Dr. Goldfarb disclosed the structure described in the  
14 '135 patent to Defendant in June or July of 1973. (11/07/07 Tr. at 377-83, 398-400; PX  
15 115.1062-67, PX 115o; Dkt. #833, p.69). Defendant subsequently filed a patent  
16 application for that structure, which copied verbatim a memo summarizing Dr. Goldfarb's  
17 research results and named Peter Cooper, the Plant Manager of Defendant's facility in  
18 Flagstaff, Arizona, as the sole inventor. (11/07/07 Tr. at 408-09, 430; PX 115.925-30; PX  
19 115n, PX 117.6-18). However, despite being named as the sole inventor, Mr. Cooper  
20 subsequently removed some of Dr. Goldfarb's lab slides to see if "there was something to  
21 be learned through the microscope that could help [Defendant] decide if production of  
22 variables in the grafts were important." (11/07/07 Tr. at 434-25; 11/08/07 Tr. at 642-43,  
23 691-92; PX 116.115123-25, PX 116.15124). That evidence is merely some of the  
24 evidence, along with the extensive litigation history before the PTO – "all of which has  
25 found Dr. Goldfarb to be the rightful inventor and patent holder" – that supports the jury's

1 finding that Defendant objectively and deliberately copied the products embodied in the  
2 '135 patent.<sup>4</sup> Accordingly, the first Read factor supports a finding of enhanced damages.

3 **B. Good-Faith Belief**

4 The second Read factor is whether Defendant, when it knew of the patent  
5 protection, investigated the scope of '135 patent and formed a good-faith belief that it was  
6 invalid or that it was not infringed. Defendant argues that it acted in good-faith because it  
7 obtained and relied on a legal opinion of counsel that the patent claims were invalid.  
8 (Dkt. #884, p.4).

9 "[A] potential infringer with actual notice of another's patent has an affirmative  
10 duty of care that usually requires the potential infringer to obtain competent legal advice  
11 before engaging in any activity that could infringe another's patent rights." Comark, 156  
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14 <sup>4</sup>Defendant contends that the jury's willfulness verdict is belied by the fact that "it was  
15 Mr. Cooper who first introduced the ePTFE vascular grafts to Dr. Goldfarb and even  
16 supplied Dr. Goldfarb with the very grafts that were the basis for Dr. Goldfarb's conception  
17 and reduction to practice." (Dkt. #884, p.3). However, there is no dispute that Mr. Cooper  
18 "had conceived the invention by the time Goldfarb evaluated the 2-73 RF graft." Cooper v.  
19 Goldfarb, 240 F.3d 1378, 1385 (Fed. Cir. 2001) ("Cooper II") (citing Cooper v. Goldfarb,  
20 154 F.3d 1321, 1326-27 (Fed. Cir. 1998) ("Cooper I")); see Hybritech Inc. v. Monoclonal  
21 Antibodies, Inc., 802 F.2d 1367, 1376 (Fed. Cir. 1986) (conception is the "formation in the  
22 mind of the inventor, of a definite and permanent idea of the complete and operative  
23 invention"). Nonetheless, Dr. Goldfarb was awarded priority of invention in the interference  
24 proceeding before the PTO because he was the first to "reduce[ ] the invention to practice."  
25 Cooper II, 240 F.3d at 1385-1386 (citing Cooper I, 154 F.3d at 1326-27); see Brunswick  
26 Corp. v. U.S., 34 Fed. Cl. 532, 584 (1995) (reduction to practice "requires that the claimed  
27 invention work for its intended purpose"). The fact that Mr. Cooper first conceived of the  
28 invention does not call into question the jury's finding that Defendant intentionally copied  
the specific structure embodied in the '135 patent, i.e., Dr. Goldfarb's reduction to practice.  
The Court agrees with Plaintiffs that there is sufficient evidence to establish that "[i]t was  
only *after* Cooper learned of the Goldfarb structure via a report of Goldfarb's work that  
[Defendant] filed the [patent] application, and only *after* Cooper [took] Dr. Goldfarb's slides  
that Gore and Cooper sufficiently understood Goldfarb's work to make a working graft and  
begin to commercialize its infringing grafts." (Dkt. #913, p.4 n.3) (emphasis in original).  
That evidence is sufficient to support the jury's willfulness verdict and finding that  
Defendant "deliberately copied the ideas or design" of the structure embodied in the '135  
patent.

1 F.3d at 1190. “To reasonably rely on an opinion, it must be authoritative, not just  
2 conclusory, and objective.” Jurgens, 80 F.3d at 1572 (citing Minn. Mining, 976 F.2d at  
3 1580 (Fed. Cir. 1992)); see Read, 970 F.2d at 829 (“Those cases where willful  
4 infringement is found despite the presence of an opinion of counsel generally involve  
5 situations where opinion of counsel was either ignored or found to be incompetent.”).

6 That an opinion is “incompetent” must be shown by objective evidence.  
7 For example an attorney may not have looked into the necessary facts, and,  
8 thus, there would be no foundation for his opinion. A written opinion may  
9 be incompetent on its face by reason of its containing merely conclusory  
10 statements without discussion of facts or obviously presenting only a  
11 superficial or off-the-cuff analysis.

12 Read, 970 F.2d at 828-29 (citations omitted); see also Comark, 156 F.3d at 1191 (“In  
13 order to provide such a prophylactic defense [against willful infringement], . . . counsel’s  
14 opinion must be premised upon the best information known to the defendant. Otherwise,  
15 the opinion is likely to be inaccurate and will be ineffective to indicate the defendant’s  
16 good faith intent.”).

17 Here, Defendant obtained an approximately 100-page opinion of counsel from the  
18 law firm of Morgan & Finnegan in 2002 that “cited the pertinent legal authorities and  
19 contained detailed analyses of the patent specification, prosecution history and claims,  
20 including a claim construction, as well as the Graham obviousness factors.” (Dkt. #884,  
21 p.6 (citing DX 3841)).

22 First, the jury was specifically instructed to consider in making its willfulness  
23 determination whether Defendant relied on a legal opinion that was well-supported and  
24 believable and that advised Defendant (1) that the products did not infringe Plaintiffs’  
25 patent or (2) that the patent was invalid. Despite that instruction, the jury returned a  
26 verdict in favor of Plaintiffs on the issue of willful infringement. Accordingly, “the only  
27 way the jury could have reached the decision that [Defendant’s] conduct was willful was  
28 to reject [Defendant’s] contention that it relied in good faith on the opinion of counsel.”  
Jurgens, 80 F.3d at 1572; see also Acumed, 483 F.3d at 811 (“The jury here was free to



1 disbelieve or weigh lightly evidence tending to show [Defendant's] reliance on the  
2 opinion letter and to place that evidence within the overall factual context of the case.”<sup>5</sup>

3 Second, there is sufficient evidence to support the jury's implicit finding that  
4 Defendant did not rely on an objective opinion of counsel as to the validity and  
5 infringement of the '135 patent.<sup>6</sup> The Court has already found that “Gore relied on the  
6 same references (the Soyer, Volder, and Matsumoto articles) to support its invalidity  
7 defense that the PTO previously found not to invalidate Dr. Goldfarb's invention.”  
8 (7/29/08 Order (Dkt. #833, p.4)). In addition, while the Court notes that “the PTO's  
9 rejection in light of [ ] identical prior art is by no means dispositive of the issues that need  
10 to be resolved to determine the validity of the asserted claims,” Agrizap, Inc. v.  
11 Woodstream Corp., 520 F.3d 1337, 1344 (Fed. Cir. 2008), the bases of alleged invalidity  
12 as set forth in Defendant's 2002 opinion of counsel were directly contrary to the validity  
13 arguments that Defendant presented to the PTO when attempting to patent Dr. Goldfarb's  
14 invention. Therefore, despite the fact that Defendants contend that the 2002 opinion of  
15 counsel “include[d] a thorough review of the cited prior art and prosecution history,”

16 \_\_\_\_\_  
17 <sup>5</sup>The Court notes that despite the instructions submitted to the jury, without objection,  
18 that in making their willfulness determination they should consider whether Defendant relied  
19 on a legal opinion that was well-supported and believable, Defendant failed to present any  
20 evidence or argument to the jury with respect to the alleged objectivity of Defendant's 2002  
21 opinion of counsel.

22 <sup>6</sup>Defendant cites Electro Scientific for the proposition that the Court may reweigh the  
23 competency of Defendant's opinion of counsel. 247 F.3d at 1354 (“Although substantial  
24 evidence supports the jury verdict of willfulness, the district court retained authority to  
25 reweigh the competency of [Defendant's] opinion of counsel and [Defendant's] reliance on  
26 that opinion.”). However, unlike this case, it is unclear whether the jury in Electro Scientific  
27 was instructed to consider in making its willfulness determination whether Defendant relied  
28 in good-faith on an objective opinion of counsel. As such, the Court will not reweigh the  
evidence presented, but merely consider whether there was sufficient evidence presented at  
trial to support the jury's verdict on willful infringement. See Church & Dwight Co. v.  
Abbott Labs., 2008 U.S. Dist. LEXIS 49588, at \*8 (“The Court concludes that the jury's  
willfulness finding precludes a finding that [Defendant] had a good faith belief either that it  
was not infringing the [patents-in-suit] or that they were invalid.”); see also Jurgens, 80 F.3d  
at 1572.

1 Jurgens, 80 F.3d at 1572, the contradictory nature of Defendant’s pre-issuance and post-  
2 issuance arguments – in addition to the fact that the 2002 opinion that the ‘135 patent was  
3 invalid was written by the same law firm that represented Defendant in its pre-issuance  
4 litigation, arguing that the patent was valid but should not be issued in Dr. Goldfarb’s  
5 name – calls into question the objective nature of the 2002 opinion of counsel. See Minn.  
6 Mining, 976 F.2d at 1582 (“In such circumstances due care may require the opinion of  
7 outside counsel.”).

8       Furthermore, it does not appear that Defendant’s 2002 opinion of counsel was  
9 necessarily premised on the best evidence available as the opinion excluded certain  
10 available evidence, such as the fact that “[e]ven with the expanded disclosure contained in  
11 Matsumoto[,] Goldfarb and others could not figure out the details of the structural grafts  
12 used by Matsumoto.” (Dkt. #868, p.8 (quoting PX 116aaa.3822)). Despite Defendant’s  
13 contention to the contrary, that evidence is relevant to the issue of anticipation and  
14 whether the Matsumoto article “enable[d] a person of skill in the art to practice the  
15 claimed invention.” (Dkt. #884, pp. 6-7). As such, although the Court is hesitant to label  
16 Defendant’s 2002 opinion of counsel as “incompetent,” in light of the jury’s verdict and  
17 the evidence presented, the Court agrees with Plaintiffs that “Gore’s decades-long attempt  
18 to patent Dr. Goldfarb’s invention, its arguments to the PTO that the invention was valid,  
19 and its abrupt about-face when the Goldfarb patent issued is . . . sufficient for the jury to  
20 reject the opinion.” (Dkt. #913, p.6). Moreover, even if the Court held otherwise, the  
21 validity arguments asserted by Defendant prior to the issuance of the ‘135 patent, as  
22 discussed above, leads the Court to conclude that despite the 2002 opinion of counsel,  
23 Defendant did not possess a good-faith belief in the invalidity or noninfringement of the  
24 ‘135 patent. See American Original Corp. v. Jenkins Food Corp., 774 F.2d 459, 465  
25 (Fed. Cir. 1985) (“Although the presence or absence of an opinion of counsel is pertinent  
26 evidence in determining good faith, that determination is based on the totality of the  
27 circumstances presented in this case.”) (internal quotation marks and citation omitted).  
28 The totality of the circumstances supports an inference that Defendant’s 2002 opinion of

1 counsel was “more of a protective device than a genuine attempt to determine before  
2 infringing whether the patent was invalid.” In re Hayes Microcomputer Prods., Inc.  
3 Patent Litig., 982 F.2d 1527, 1544 (Fed. Cir. 1992). Thus, the second Read factor weighs  
4 somewhat in favor of enhanced damages.

5 **C. Behavior as a Party of the Litigation**

6 The third Read factor is whether Defendant’s behavior as a party to the litigation  
7 was reprehensible. Defendant argues that [w]hile Gore did not prevail before the jury, it  
8 continues to believe that [its] defenses [to Plaintiffs’ claims of infringement] have merit  
9 and that it will eventually be vindicated.” (Dkt. #884, p.7). Defendant also “cautions”  
10 the Court “not to draw any adverse inference from Gore’s zealous advocacy and the fact  
11 that it did not prevail at the trial level.” (Id.).

12 The Court is well aware that “an infringer may generally avoid enhanced damages  
13 with a meritorious good faith defense.” Delta-X Corp. v. Baker Hughes Production  
14 Tools, Inc., 984 F.2d 410, 413 (Fed. Cir. 1993). However, there comes a point when a  
15 defendant’s zealous advocacy runs so contrary to reality that such continuing reliance on  
16 its positions, without change or reevaluation of those positions, becomes reprehensible.  
17 Here, as discussed above, the good-faith nature of Defendant’s “zealous advocacy” is  
18 called into question by the fact that Defendant spent decades fighting before the PTO and  
19 the Federal Circuit to patent the Goldfarb invention as its own and block the issuance of  
20 the ‘135 patent in Dr. Goldfarb’s name, only to then attack the validity of that patent with  
21 every tool in the toolbox once it was issued in Dr. Goldfarb’s name, while all along  
22 manufacturing products that contain the same or similar ePTFE microstructure claimed in  
23 the ‘135 patent.<sup>7</sup>

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24  
25 <sup>7</sup>The Court notes that it stated in its September 29, 2005 order on Plaintiffs’ Motion  
26 to Narrow the Issues (Dkt. #223) that “[t]he positions Gore took before the PTO and  
27 subsequent tribunals do not appear to be irreconcilably inconsistent with the invalidity  
28 defenses Gore now asserts, that is, anticipation based on prior art and inequitable conduct  
before the PTO based on alleged failure to name the proper inventor.” (Dkt. #311, p.12).  
The Court thus “conclude[d] that principles of judicial estoppel do not necessarily preclude

1           “The Court’s analysis of this factor focuses on the objective reasonableness of the  
2 contentions put forth during this litigation.” Church & Dwight, 2008 U.S. Dist. LEXIS  
3 49588, at \*9 (citing Hoechst Celanese Corp. v. BP Chemicals Ltd., 846 F. Supp. 542,  
4 548-549 (S.D. Tex. 1994) (focusing on the objective reasonableness of counsel’s  
5 arguments, not their professionalism and talent), aff’d, 78 F.3d 1575 (Fed. Cir. 1996)).  
6 For the reasons discussed in the Court’s July 2008 JMOL opinions, Defendant’s  
7 numerous infringement and invalidity defenses, and inequitable conduct claims, were, on  
8 the whole, not very strong. (Dkt. #s 833-835).

9           As the Court noted, Defendant’s JMOL on invalidity “b[ore] a striking  
10 resemblance to the arguments Gore set forth in its February 2004 Motion for Partial  
11 Summary Judgment (Doc. 68 at 5-13). The Court denied that Motion. Now, three years  
12 later, following trial of this matter, Gore asserts the argument again.” (Dkt. #833, p.5).  
13 The Court went on to conclude that Defendant’s written description, best mode,  
14 typicality, lack of novelty, infringement, obviousness, anticipation, and joint ownership  
15 defenses and counterclaims were somewhat weak. See, e.g., Dkt. #833, p.6 (“Gore’s  
16 argument appears to ignore the fact that these same issues were rejected by the Patent  
17 Office”), p.7 (“[T]he only evidence Gore offered to rebut infringement of the ‘average  
18 distance between nodes’ limitation . . . is the testimony and measurements of Gore’s  
19 expert Dr. McMillin. However, Dr. McMillin offered no testimony to contradict that the  
20 ePTFE base graft included in each of the accused products has a ‘typical’ distance  
21 between nodes that fits within the claims.”), p.8 (“In fact, at trial, Gore’s fact witness, Mr.

22  
23  
24 Gore’s affirmative defenses concerning inequitable conduct.” (Id.). However, in light of the  
25 Court’s continued involvement in this case over the past four years, the complexity of patent  
26 law and the issues presented, and the current posture of the case, the Court is now more  
27 inclined to conclude that at least some of the positions taken by Defendant before this Court,  
28 in light of the contradictory nature of some of the positions taken by Defendant over the past  
thirty years of litigation over the invention claimed in the ‘135 patent, amount to “playing  
fast and loose with the court.” (Id., p.11 (quoting Yanez v. United States, 989 F.2d 323, 326  
(9th Cir. 1993)).

1 Detton, stated that ‘you couldn’t figure anything’ from the Matsumoto article ‘because  
2 the article itself did not define anything.’”), p.11 (“Gore has not established, nor even  
3 discussed, the ‘ready for patenting’ requirement to prove anticipation”). Defendant also  
4 (1) relied heavily on fact witness, D. Dan Detton, whom the Court noted “ha[d] perjured  
5 himself previously,” and whose testimony was “highly suspect and lacking in credibility”  
6 (Dkt. #835, p.66), (2) failed to present evidence from Dr. Volder, despite the fact that it  
7 claimed that Dr. Volder was the actual or joint inventor (see Dkt. #835, pp. 70, 72), and  
8 (3) failed to present evidence with respect to its invalidity theory concerning the Cohn  
9 graft despite conducting discovery and motion practice on the issue and identifying  
10 witnesses to testify to the graft’s chain of custody (Dkt. # 526, pp. 6-7, 9, 13, 16).  
11 Furthermore, Defendant failed to present any evidence in support of its unfair competition  
12 counterclaims.<sup>8</sup>

13 The record establishes that Defendant “adopted a ‘shotgun’ approach of litigating  
14 virtually every conceivable issue, thereby burdening the Court with a number of meritless  
15 arguments.” Church & Dwight, 2008 U.S. Dist. LEXIS 49588, at \*9. Defendant  
16 presented nine different invalidity defenses and seven separate bases for alleged  
17 inequitable conduct at trial. (Dkt. #835). And in addition to those issues discussed  
18 above, Defendant proffered the expert report and testimony of Dr. Wheatley, who  
19 adopted claim constructions inconsistent with those recommended by the Special Master  
20 and adopted by the Court “without reviewing the Special Master’s R&R or the Court’s  
21

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22 <sup>8</sup>Although the Court recognizes that elimination of issues and withdrawal of defenses  
23 prior to trial do not alone establish bad faith or constitute vexatious or dilatory tactics, Stickle  
24 v. Heublein, Inc., 716 F.2d 1550, 1564-65 (Fed. Cir. 1983), unlike Stickle, here the record  
25 discloses that Defendants raised an entire litany of affirmative defenses and counterclaims  
26 that are commonly asserted in patent cases without regard to the merits of, or evidentiary  
27 support for, some of those defenses and claims. See Medtronic Navigation, Inc. v. BrainLAB  
28 Medizinische Computersystems GmbH, 2008 U.S. Dist. LEXIS 13483, at \*6 (D. Colo. 2008)  
 (“Vexatious conduct includes conduct that obfuscates the legal issues and complicates . . .  
 the court’s task of sorting them out.”) (internal quotation marks and citation omitted).

1 Order adopting the R&R.” (Dkt. #559, p.18). The Court found that “Gore’s silence in its  
2 Response regarding the issue of Dr. Wheatley’s report contradicting the Court’s claim  
3 construction [wa]s significant.” (Id., p.20); see Medtronic, 2008 U.S. Dist. LEXIS 13483,  
4 at \*18 (“After receiving the Court’s claims construction ruling, however, [Defendant] had  
5 a duty to reexamine this litigation and make an objective assessment of the validity [of  
6 their defenses].”). In addition, some of Defendant’s pre-trial and post-trial positions  
7 appear contradictory. For example, in the instructions to the jury, Plaintiffs contended  
8 that “a person of ordinary skill was a surgeon who performed vascular surgery,” while  
9 Defendant contended more broadly “that a person of ordinary skill was a person involved  
10 in and familiar with the design, development, and use of vascular grafts.” (Dkt. #769,  
11 p.59). Defendant now, in its RJMOL, states that both Plaintiffs *and* Defendant’s expert  
12 believe that the level of ordinary skill is restricted to “a surgeon with vascular surgery  
13 experience.” (Dkt. #848, p.2). Accordingly, for those reasons, among others, the Court  
14 concludes the third Read factor weighs at least somewhat in favor of enhanced damages.

15 **D. Size and Financial Condition**

16 The fourth Read factor is whether Defendant’s size and financial condition would  
17 allow it to weather an enhancement of damages. Here, it is undisputed that Defendant is a  
18 large and financially sound company. Defendant employs approximately 7,000  
19 individuals in 45 different plants and [REDACTED] annual sales. (PX  
20 1478.4). In addition, during the period for which damages were calculated – from August  
21 20, 2002 until June 30, 2007 – Defendant sold [REDACTED] of the  
22 infringing graft products. (11/15/07 Tr. at 1399-1400; PX 114). Furthermore, the  
23 profitability margin for those products [REDACTED] (11/15/07 Tr. at  
24 1358-61; PX 998.4, PX 1403.47). However, Defendant points to statements in the  
25 Sininger Declaration that Plaintiffs’ “figures are misleading because they ignore fixed and  
26 previously sunk costs,” and that “Gore has not recouped its investment expended in the  
27 development of the [infringing] products.” (Dkt. #884, p.10). Defendant also points to  
28 Mr. Sininger’s statement that “[t]he jury’s award represents [REDACTED]

1 Gore's Medical Division's after tax profit for the damages period and this does not take  
2 into account Gore's cumulative cash investment in the development costs for these  
3 products," and that "any enhancement of damages will not only delay but could prevent  
4 Gore's expansion of its Medical Products business on land purchased in North Phoenix."  
5 (Id.).

6 First, however, Plaintiffs' evidence on Defendant's profitability was  
7 uncontroverted at trial. (11/15/07 Tr. at 1443:20-1448:2; 12/04/07 Tr. at 3014:1-  
8 3015.16). Second, Mr. Sininger's statements that Plaintiffs' figures ignore fixed and  
9 previously sunk costs, and the alleged amount of those costs, lacks evidentiary support  
10 and amounts to self-serving and conclusory statements See Taylor v. List, 880 F.2d 1040,  
11 1045 (9th Cir. 1989) (conclusory allegations, unsupported by factual material, are  
12 insufficient). In addition, Mr. Sininger fails to inform the Court how much of Gore's  
13 Medical Division's profits for the damages period are derived from sales of the infringing  
14 products, let alone why the Court is required to consider only after tax profits.  
15 Regardless, the fourth Read factor is not limited to the profits of only one of Defendant's  
16 divisions; it is an inquiry into Defendant's entire size and financial condition and whether  
17 enhanced damages would irreparably harm Defendant or, in the alternative, is necessary  
18 to provide a sufficient deterrent effect.

19 Moreover, to the extent that Defendant alleges that an enhanced damages award  
20 might prevent it from expanding its Medical Division's operations in one instance,  
21 Defendant does not indicate what sort of enhanced damages award would have that effect  
22 (double, treble?). In any event, one who elects to build or grow a business on a product  
23 found to infringe can not be heard to complain if an enhanced damages award adversely  
24 impacts the business so elected. See Windsurfing Int'l, Inc. v. AMF, Inc., 782 F.2d 995,  
25 1003 n.12 (Fed. Cir. 1986) ("One who elects to build a business on a product found to  
26 infringe cannot be heard to complain if an injunction against continuing infringement  
27 destroys the business so elected."). The Court agrees with Plaintiffs: "It takes nerve for a  
28 willful infringer to complain that enhancing damages will adversely impact its ability to

1 continue to infringe.” (Dkt. #913, p.8 n.9). For these reasons, in addition to the fact that  
2 an enhanced damages award appears necessary to provide a sufficient deterrent effect  
3 given the extensive history of litigation with respect to the invention claimed in the ‘135  
4 patent, the Court concludes that the fourth Read factor weighs in favor of enhancement.

5 **E. Closeness of the Case**

6 The fifth Read factor is whether the case was relatively close or not based on the  
7 evidence presented. Here, the jury returned a unanimous verdict in favor of Plaintiffs,  
8 finding that all eight asserted claims were willfully infringed by Defendant’s vascular  
9 grafts and/or stent grafts, and rejecting Defendant’s nine invalidity defenses and seven  
10 bases for alleged inequitable conduct. (Dkt. #s 771, 835). However, Defendant argues  
11 that “Plaintiffs are not entitled to enhanced damages simply because they are the  
12 prevailing party.” (Dkt. #884, p.11). To the contrary, Defendant’s argue, “Defendant’s  
13 invalidity, unenforceability, and noninfringement defenses have had merit, and the issues  
14 raised by th[o]se defenses were so close that they could not be decided prior to trial.” (Id,  
15 p.10).

16 It is well-settled that “a finding of willful infringement merely *authorizes*, but does  
17 not *mandate*, an award of increased damages.” Modine Mfg. Co. v. Allen Group, Inc.,  
18 917 F.2d 538, 543 (Fed. Cir. 1990) (emphasis in original); see Cybor Corp., 138 F.3d at  
19 1461 (“[A]lthough Cybor was found to infringe all twenty of the claims, this result does  
20 not mean that the case was not close, particularly in light of its justifiable albeit  
21 unsuccessful arguments regarding the prosecution history of the ‘837 patent.”). However,  
22 unlike Modine or Cybor, here, for the reasons discussed above and in the Court’s JMOL  
23 opinions, the evidence on willfulness and copying was not weak (whereas the evidence  
24 supporting a number of Defendant’s defenses was somewhat weak). Nonetheless, the  
25 Court cannot conclude that all of Defendant’s defenses were entirely without merit.  
26 Accordingly, the fifth Read factor is either neutral or weighs only somewhat in favor of  
27 enhanced damages.

28



1           **F.     Duration of Misconduct**

2           The sixth Read factor is the duration of Defendant’s misconduct. Defendant  
3 argues that the “duration of any alleged misconduct . . . was only *seven months* between  
4 the issue date of the patent and the commencement of this lawsuit.” (Dkt. #884, p.15)  
5 (emphasis added).

6           In light of the extensive history of litigation over the invention claimed in the ‘135  
7 patent, and the fact that Defendant continues to infringe the ‘135 patent, that contention is  
8 somewhat astonishing. Clearly “willful infringement is misconduct.” Church & Dwight  
9 Co., 2008 U.S. Dist. LEXIS 49588, at \*12. In addition, although Defendant is correct  
10 that “[t]o willfully infringe a patent, the patent must exist and one must have knowledge  
11 of it,” State Indus. Inc. v. A.O. Smith Corp., 751 F.2d 1226, 1236 (Fed. Cir. 1985), as  
12 discussed above, the misconduct relevant to an enhancement analysis can begin well  
13 before the issuance of the patent-in-suit. See Minn. Mining, 976 F.2d at 1581. Here,  
14 although the ‘135 patent did not issue in Dr. Goldfarb’s name until 2002, Defendant filed  
15 a patent application to patent the invention claimed therein in 1974. Defendant was  
16 intimately familiar with Dr. Goldfarb’s patent application and knew the scope of the  
17 count of the interference in 1983. That count ultimately issued with minor changes (that  
18 did not impact the scope of coverage in any material way) as Claim 20. Moreover, the  
19 PTO concluded in 1995 that Dr. Goldfarb established priority and the earlier reduction to  
20 practice (a decision that was upheld numerous times by both the PTO and Federal  
21 Circuit). Cooper I, 154 F.3d at 1326-27. As such, in light of Defendant’s intimate  
22 involvement in the extensive litigation history over the invention claimed in the ‘135  
23 patent, Defendant cannot in good faith now contend that it was not knowingly using Dr.  
24 Goldfarb’s invention prior to issuance of the ‘135 patent. But see State Indus., 751 F.2d  
25 at 1236 (“What the scope of claims in patents that do issue will be is something totally  
26 unforeseeable.”). Accordingly, the sixth Read factor favors an enhancement of damages.

27     ///

28

1           **G. Remedial Action**

2           The seventh Read factor is whether Defendant's have taken any remedial action to  
3 mitigate or minimize infringement.

4           "[T]he relevant time for remedial action [is when the infringing party] learned of  
5 the lawsuit." nCUBE Corp. v. SeaChange Int'l, Inc., 313 F. Supp. 2d 361, 390 (D. Del.  
6 2004). Here, it is undisputed that Defendants have taken no remedial action since  
7 learning of the instant lawsuit. But Defendants argue that "there was no possible way for  
8 Gore to sell Dacron stent grafts [i.e., a non-infringing alternative product] because it  
9 would have taken many years to develop, clinically test and obtain FDA approval for  
10 non-ePTFE stent graft products and with no assurance that such products would be  
11 acceptable for Gore's present life saving products." (Dkt. #884, pp. 15-16). However, as  
12 Plaintiffs point out, "Gore presented no evidence at trial that it ever attempted to  
13 manufacture or obtain FDA approval to sell a non-ePTFE graft." (Dkt. #913, p.11). And  
14 Defendant's contention that it had no assurances that Dacron products would be  
15 acceptable is belied by the testimony of Defendant's own expert, Dr. Wheatley, that  
16 "[t]here is no difference between those two graft materials [ePTFE and Dacron] and graft  
17 products when dealing with either open surgical repair on the aorta or endovascular  
18 repair." (11/27/07 Tr. at 1821:13-23). Moreover, it is undisputed that after learning of  
19 the instant lawsuit, Defendant made no attempt to avail itself of the below-market royalty  
20 rate in the 1984 sublicense option. Accordingly, the seventh Read favor supports a  
21 finding of enhanced damages.

22           **H. Motivation for Harm**

23           The eighth Read factor is whether Defendant's infringement was driven by a  
24 motivation to harm. Plaintiffs merely reiterate their arguments above that "Gore's  
25 conscious decision to continue with its objectively reckless infringement, rather than  
26 abate its infringement through license or otherwise, is strong evidence of an intent to  
27 harm warranting enhancement." (Dkt. 913, p.11). Defendant, on the other hand, argues  
28

1 that “Gore’s decision to develop and market its products cannot be the basis for Plaintiffs’  
2 assertion since they had their origin long before the patent issued.” (Dkt. #884, p.16).

3       However, “willful infringement by a direct competitor in a competitive market  
4 when the infringer did not have a strong basis to believe that the patents were invalid”  
5 constitutes motivation for harm.” Church & Dwight, 2008 U.S. Dist. LEXIS 49588, at  
6 \*13. It is undisputed that the parties are direct competitors in the same market for at least  
7 some of the infringing products (such as those products for which Plaintiffs were awarded  
8 lost profits). In addition, as discussed above, the totality of the circumstances support that  
9 for at least part of the extensive history of litigation surrounding the invention claimed in  
10 the ‘135 patent, and certainly during the post-issuance litigation, Defendant did not  
11 appear to have a strong basis for asserting that the patent was invalid or unenforceable.  
12 That is compounded by the fact that Defendant has taken no remedial action at any time  
13 since either the issuance of the ‘135 patent or the jury’s finding that Defendant wilfully  
14 infringed the patent. Accordingly, the eighth Read factor supports a finding of enhanced  
15 damages.

16       **I.       Attempt to Conceal**

17       The ninth Read factor is whether Defendant attempted to conceal its allegedly  
18 infringing conduct. Defendant states that “Gore has openly promoted and marketed its  
19 products.” (Dkt. #884, p.16). Plaintiff does not dispute this statement, and presents no  
20 arguments with respect to this factor. Accordingly, the ninth Read factor does not support  
21 a finding of enhanced damages.

22       **J.       Amount of Enhancement**

23       In light of the totality of the circumstances, the Court finds that Plaintiffs are  
24 entitled to an award of enhanced damages under 35 U.S.C. § 284 and the Read factors.  
25 The jury found that there was willful infringement; the evidence presented supports that  
26 finding. In addition, as discussed above, eight of the nine Read factors favor enhanced  
27 damages.

28

1           However, the Court notes that three of the Read factors – good faith belief,  
2 behavior as a party to the litigation, and closeness of the case – only somewhat favor an  
3 enhancement of damages. Thus, the Court, in its discretion, concludes that the maximum  
4 enhancement is not appropriate. But see Amsted Indus. Inc. v. Buckeye Steel Castings  
5 Co., 24 F.3d 178, 183-84 (upholding the district court’s decision to treble damages where  
6 there was deliberate copying, bad faith, inappropriate litigation behavior, and closeness of  
7 the willfulness issue). The maximum enhancement under 35 U.S.C. § 284 is appropriate  
8 only when the Read factors conclusively demonstrate the infringer’s bad faith and the  
9 egregiousness of the infringer’s conduct. Here, as some of the Read factors concerning  
10 Defendant’s bad faith and behavior only somewhat favor a finding of enhanced damages,  
11 the Court declines to award the maximum enhancement. Instead, the Court, in its  
12 discretion and in consideration of the Read factors, concludes that the damages should be  
13 enhanced by a factor of two.

## 14 **II. PLAINTIFFS’ MOTION FOR ATTORNEY FEES**

15           Under 35 U.S.C. § 285, the Court, using its inherent authority, may “in exceptional  
16 cases . . . award reasonable attorney fees to the prevailing party.” Attorney fees are  
17 generally compensatory in nature, and are not designed to punish the non-prevailing  
18 party. Central Soya Co., Inc. v. Geo A. Hormel & Co., 723 F.2d 1573, 1578 (Fed. Cir.  
19 1983) (“The purposes of § 285 is, in a proper cases and in the discretion of the trial judge,  
20 to compensate the prevailing party for its monetary outlays in the prosecution or defense  
21 of the suit.”).

22           To award attorney fees, the Court must employ a two-step process: (1) “The  
23 district court must first determine whether the case is exceptional, . . . [and (2)] if the case  
24 is found to be exceptional, the district court must then determine whether attorney fees  
25 should be awarded.” Enzo Biochem, Inc. v. Calgene, Inc., 188 F.3d 1362, 1370 (Fed. Cir.  
26 1999). A case is exceptional where “there has been some material inappropriate conduct  
27 related to the matter in litigation, such as wilful infringement ,” Brooks Furniture Mfg.,  
28 Inc. v. Dutailier Int’l, Inc., 393 F.3d 1378, 1381 (Fed. Cir. 2005), or “bad faith, litigation

1 misconduct, and unprofessional behavior,” SeaChange, 436 F.3d at 1325. Inappropriate  
2 conduct by the parties or its counsel covers a spectrum of misdeeds, such as frivolous  
3 claims or other vexatious actions, and the presentation of non-credible testimony, baseless  
4 defenses, or duplicative motions. See Beckman Instruments, Inc. v. LKB Produkter AB,  
5 892 F.2d 1547, 1551 (Fed. Cir. 1989). In addition, with respect to whether the prevailing  
6 party should be entitled to recover attorney fees, “[a]s a general rule, attorneys fees under  
7 section 285 may be justified by any valid basis for awarding [statutorily enhanced]  
8 damages under section 284.” Jurgens, 80 F.3d at 1573 n.4. As discussed in the preceding  
9 section, the Court employs the Read factors to determine whether the prevailing party is  
10 entitled to enhanced damages. In the instant case, the Parties have stipulated that, if  
11 applicable, \$19 million would be a reasonable award of attorney fees and non-taxable  
12 costs. (Dkt.#919.) Thus, the only issue before the Court is whether Plaintiffs are entitled  
13 to that stipulated amount.

14 Here, the jury was instructed, without objection, on the issue of willful  
15 infringement and returned a verdict in favor of Plaintiffs, finding that Defendant had  
16 willfully infringed the ‘135 patent. In addition, the Court ruled against Defendant in its  
17 JMOL and RJMOL, holding that the jury verdict on willfulness was supported by  
18 substantial evidence. As such, the Court will not go through the evidence supporting the  
19 jury’s verdict at this time; several points are, however, worth noting. First, the evidence  
20 presented at trial permitted the jury to conclude that Defendant acted in an objectively  
21 reckless manner. Among other things, the jury was able to determine that Defendant  
22 fought vigorously for control and ownership of Dr. Goldfarb’s patent for 18 years in the  
23 interference proceedings—and the matter now apparently has the longest patent history in  
24 the history of the PTO, along with two appeals before the Federal Circuit, only to claim  
25 after it repeatedly lost that it did not practice the very invention it fought so hard to  
26 control. All the while, Defendant produced and sold the infringing patent. Accordingly,  
27 based on the totality of the circumstances, the Court finds that the jury’s verdict on willful  
28 infringement (and evidence in support thereof) is a sufficient basis for classifying this

1 case as exceptional for the purpose of awarding attorney fees. See, e.g., Mahurkar v. C.R.  
2 Bard, Inc., 79 F.3d 1572 (Fed. Cir. 1996).

3 Furthermore, Defendant, as a party to this litigation, has taken contradictory  
4 positions that also justify an award of attorney fees. The Court notes, again, that  
5 Defendant's reference to the Court's September 29, 2005 order as evidence that  
6 Defendant could not have acted in bad faith in taking such contradictory positions is  
7 unavailing. The Court's previous order, issued at a fairly early stage in the litigation, did  
8 not reflect subsequent findings and the Court's growing awareness of the nature of this  
9 case and what appears to be Defendant's decades-long patent, litigation, and business  
10 strategy. Defendant argued before this Court that it did not practice the Goldfarb patent  
11 because the accused products did not permit tissue ingrowth or meet the average  
12 internodal distance limitation of the claims. (PX16, 21 22-23. 112.26, 136,137.22, 345).  
13 Yet, Gore's position was belied by earlier admissions made by its representatives that the  
14 accused products fell squarely within the asserted claims. Defendant offered scant  
15 evidence, in the form of testimony by Drs. Aretz and McMillan, to rebut those earlier  
16 positions. There is also the issue of Defendant's proffered theory of the "Volder  
17 inventorship," which was refuted by a sworn statement from Dr. Volder himself. Several  
18 questions regarding this theory still remain unresolved, not the least of which is  
19 Defendant's decision not to memorialize Dr. Volder's testimony in the vast amount of  
20 time prior to his infirmity, despite the payments that were made to him. (11/30/07 Tr. at  
21 2664-65; Dkt.#835, p.72). In fact, the Court has already commented on Dr. Volder's lack  
22 of presence in this case:

23 Gore made no attempt to depose Dr. Volder or obtain his sworn statement  
24 before the close of fact discovery. The Court reiterates that there is no  
25 indication that Dr. Volder has ever claimed to be the inventor based on his  
own sworn statement or deposition testimony.

26 (Dkt. #343). The Court also notes that reliance on testimony found by the Court to be  
27 "not credible," "unconvincing," or "unbelievable" is an additional basis to award attorney  
28 fees. Nilsen v. Osram Sylvania, Inc., 528 F.3d 1352, 1359 (Fed. Cir. 2008). Defendant

1 relied on the testimony of Mr. Detton throughout the course of this case; he was also paid  
2 by Defendant. However, in its July 29, 2008 order, the Court found that Mr. Detton's  
3 testimony was unconvincing, unbelievable, and not credible, writing "[t]he Court notes  
4 that Mr. Detton has perjured himself previously. The Court finds his testimony highly  
5 suspect and lacking in credibility." (Dkt. #835, p.66). Thus, Defendant's reliance on Mr.  
6 Detton's testimony further justifies the imposition of attorney fees.

7 The Court incorporates by reference its discussion of the Read factors in the  
8 preceding section of this Order, and finds that those factors also contribute to the overall  
9 determination by the Court that attorney fees are justified given the exceptional nature of  
10 this case. See Enzo Biochem, 188 F.3d at 1370.

11 **Accordingly,**

12 **IT IS HEREBY ORDERED** denying Plaintiffs' Motion to Strike the Sininger  
13 Declaration. (Dkt. #910).

14 **IT IS FURTHER ORDERED** granting in part Plaintiffs' Motion for Enhanced  
15 Damages. (Dkt. #868). Plaintiffs' damages award is doubled from \$185,589,871.02 to  
16 \$371,179,742.04.

17 **IT IS FURTHER ORDERED** granting Plaintiffs' Motion for Attorney Fees and  
18 Non-Taxable Costs. (Dkt. #850). Plaintiffs are awarded \$19 million in attorney fees and  
19 non-taxable costs.

20 **IT IS FURTHER ORDERED** directing the Clerk of the Court to unseal this  
21 Order on April 15, 2009, unless counsel file a notice of opposition to unsealing the Order  
22 prior to that date.

23 DATED this 31<sup>st</sup> day of March, 2009.

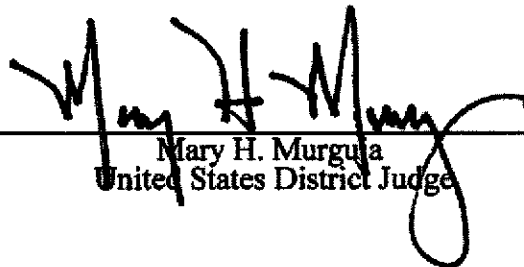
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\_\_\_\_\_  
Mary H. Murguía  
United States District Judge

cc: all counsel