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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 15-1193

SABATINO BIANCO, M.D.,

Plaintiff-Appellee,

v.

GLOBUS MEDICAL, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas, Marshall Division in No. 2:12-cv-00147-WCB, Circuit Judge William C. Bryson.

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FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Appellee certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Sabatino Bianco, M.D.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

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

None.

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Charles Everingham IV, Steven Zager, Michael Simons, David Stein, Emily Johnson, Ifti Ahmed, and Pratik Shah of Akin Gump Strauss Hauer & Feld LLP and Don Edwin Stokes at the Stokes Firm

12/19/14
Date

/s/ Charles Everingham IV
Signature of counsel

Charles Everingham IV
Printed name of counsel

Please Note: All questions must be answered
cc: all counsel of record

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CONFIDENTIAL MATERIAL OMITTED

The material omitted from this brief includes confidential information that was placed under seal by the district court.

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Appellee Sabatino Bianco, M.D. states that Appellant Globus Medical Inc. filed a notice of appeal of the district court's final judgment to the United States Court of Appeals for the Fifth Circuit on November 12, 2014. *Sabatino Bianco, M.D. v. Globus Medical, Inc.*, No. 14-41281. Globus then filed a motion to dismiss the appeal pursuant to Federal Rule of Appellate Procedure 42, which the Fifth Circuit granted on December 10, 2014. Globus filed a notice of appeal in this Court on November 20, 2014.

Dr. Bianco is not aware of any other appeal arising out of this action that has come before this Court or any other appellate court. Nor is Dr. Bianco aware of any case pending in this or any other court that will directly affect or will be directly affected by this Court's decisions in the pending appeal.

JURISDICTIONAL STATEMENT

The U.S. District Court for the Eastern District of Texas had jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338(a). This Court has jurisdiction over an appeal from a final judgment of the district court under 28 U.S.C. § 1295(a)(1).

STATEMENT OF ISSUES ON APPEAL

I. Whether the evidence supports the jury's finding that Dr. Bianco's idea for a continuously expandable interbody spacer combined with a description of its key features constituted a protectable trade secret under Texas law.

II. Whether the district court abused its discretion when it confirmed the jury's award for past damages based on Globus's proposed royalty base and a royalty rate derived from other Globus license agreements.

III. Whether the district court abused its discretion by awarding an ongoing royalty contemplated by Texas law and based on a separate post-trial proceeding on future damages that Globus had originally proposed.

INTRODUCTION

This appeal arises from a jury verdict finding Defendant-Appellant Globus Medical, Inc. liable for misappropriation of Appellee Dr. Sabatino Bianco's trade secret, consisting of the novel idea for a continuously adjustable spinal implant product with certain key features. Pursuant to a confidentiality agreement, Dr. Bianco shared his concept and design drawings with Globus. Globus then surreptitiously exploited his trade secret to develop a commercially successful line of continuously adjustable spinal implants.

The sole liability issue that Globus raises on appeal is whether Texas trade secret law protects a "mere idea." Despite its failure to object to the relevant jury instructions, Globus now argues that Texas law affords no such protection. But that argument rests on a fundamental mischaracterization of the nature of Dr. Bianco's trade secret: as the trial evidence showed and as the district court confirmed, the trade secret at issue encompasses not only the core product idea but also a description of key product features. Because Dr. Bianco's trade secret is not a "mere idea," resolution of the abstract legal question Globus presents cannot make a difference in this case. In any event, Texas law does not draw such a rigid distinction between product ideas and trade secrets. As the district court correctly held, Texas law (consistent with the Restatement (First) of Torts) does not preclude new product ideas from trade secret protection—let alone Dr. Bianco's new product idea in combination with key design features.

Globus also challenges the damages awards. But the district court properly confirmed—and certainly did not abuse its discretion in upholding—the jury's award of past damages based on the royalty base that Globus itself had proposed and a royalty rate derived from evidence of other Globus license agreements. Globus's further argument that Texas law prohibits *any* award of ongoing royalties conflicts with both controlling trade secret precedent and basic principles of equitable-relief, as well as Globus's own prior request for separate post-trial proceedings on future damages. Accordingly, the well-supported jury verdict and damages awards should be affirmed.

STATEMENT

A. Factual Background

1. The Parties

Plaintiff-Appellee Dr. Sabatino Bianco, a well-respected and Board-certified neurosurgeon, specializes in minimally invasive brain and spinal procedures, neuroendoscopy, neurovascular procedures, and spinal deformity correction. A former Director of the Trinity Mother Frances Neuroscience Institute with 20 years of experience in the field, Dr. Bianco opened his own surgical clinic in Arlington, Texas in 2009. A6494; A6498-6505.

At the time of the events giving rise to this suit, Defendant-Appellant Globus

Medical, Inc. was a relatively small, privately held entity that has since grown into a large, publicly traded medical device company. Globus manufactures and sells medical devices, including spinal implants that surgeons use to perform spinal fusion surgery. The products at issue before the district court and the jury were three Globus devices that are implanted in patients during fusion surgery: Globus's Caliber, Caliber-L, and Rise products (collectively, the "Caliber and Rise products"). A108.

As is customary in the medical device industry, Globus relies on surgeons to bring it ideas, new product designs, and surgical know-how. A6991-6992; A206; A247. Globus considers those submissions and considers whether to incorporate those ideas and designs into product lines. A6533; A206; A247. If Globus decides it wants to incorporate a surgeon's idea or design into a product, Globus and the surgeon try to agree on fair compensation. *Id.* Consistent with this practice, Globus sought ideas, designs, and surgical know-how from Dr. Bianco. A111; A6517-6518; A206; A247.

2. Spinal Implant Technology

This case involves Dr. Bianco's idea for a new spinal implant used in spinal fusion surgeries. Spinal fusion surgery is "often performed on patients with degenerative disc disease, which causes the space between two adjacent vertebrae in the spine to become compressed." A107. The soft disc material between the vertebrae can bulge or rupture, pinching the nerves that extend from the spinal column and causing significant pain. *Id.* Spinal fusion surgery is performed "to remove the compressed disc material, restore the distance between the two vertebrae, and cause new bone material to grow between the vertebrae" so that they fuse into a single vertebral bone. *Id*. Surgeons replace the soft disc material with small implants called "spacers" or "interbody spacers." *Id*. "The spacers remain in the patient's body to maintain the separation between the two . . . vertebrae while the new bone grows and ultimately fuses the two vertebrae together." A108.

Before the commercialization of the accused products, almost all the spinal implants available for spinal fusion surgeries were "static" spacers of fixed sizes. A108. A surgeon using a static implant "would try to select the appropriate size for a particular patient" and then force the spacer into the space between the vertebrae. *Id*. Static spacers require the surgeon to apply considerable force to "wedge" or "hammer" the spacer between the vertebrae to obtain the desired tight fit. *Id.* One type of spacer, the Spine Wave StaXx XD, was expandable, but it was expandable in only discrete increments by inserting a series of additional static wedges into the implant; it was not continuously expandable and could not be reduced in height once it was expanded. *Id.*; A150 (citing A7006-7007).

3. Dr. Bianco's Trade Secret

After performing thousands of spinal fusion surgeries, Dr. Bianco recognized problems with the interbody spacers then available on the market. Because the spacers were not continuously expandable, they did not allow for a custom fit to every patient. Because of the risk of nerve damage to the spinal cord, the spacers could not be adjusted after implantation to better fit the patient's disc space. Inserting the spacers also required application of considerable force at the risk of patient trauma. A108. After years of surgeries, six to seven months of contemplation, and roughly ten to twelve hours at the drawing board, Dr. Bianco developed an idea for a new adjustable interbody spacer with certain key features for use in fusion surgeries. A3791. Dr. Bianco kept his drawings in a safe in his office. A6531.

In early 2007, Globus invited Dr. Bianco to its headquarters for a "VIP trip" to meet the company's executives and learn about its new products. A111. During that visit, Dr. Bianco told Globus representatives that he had some new designs for implants for spinal surgery for Globus's consideration. *Id.*; A6517-6518. At that time, Globus sold a fixed-size interbody spacer, but it did not offer an expandable one. A111; A6520. During the meeting, Globus representatives explained to Dr. Bianco "the protocol for physicians to submit new product ideas to the company." A111; A6522. Globus had Dr. Bianco "sign a non-disclosure agreement that prohibited him from disclosing any of Globus's ideas and prohibited Globus from disclosing any of his ideas without his input." A111; *see also* A6518-6519.

After the VIP meeting, Dr. Bianco told Globus area director (and later regional vice-president) Gregg Harris about his idea for a new spacer product. A111. Mr. Harris instructed him to notarize any drawings depicting his product idea and design to protect both Dr. Bianco and Globus, "so we make sure we don't have problems afterwards." *Id*. (citing A6522, A6532). Another Globus representative "made a similar request by email that Dr. Bianco notarize his drawings." *Id*. (citing A6532). In July 2007, after notarizing his drawings, Dr. Bianco gave them to Gregg Harris and met with him for at least one hour to discuss Dr. Bianco's new idea for a continuously adjustable interbody spacer. *Id*. (citing A6522-32).

The set of drawings was entitled "Adjustable Interbody Spacer." A112; A6525; A10307-10319; A10323-10327. The drawings depict a continuously expandable/collapsible spacer. A112 (citing A10307-10319). In one sketch, the spacer element is connected to a long shaft with a measuring dial and index on the end of the shaft opposite the spacer element. *Id*. In another, a spacer element is depicted "with a 'scissor-jack' mechanism for increasing or decreasing the height of the spacer in the range of 6 to 14 millimeters." *Id*. (citing A10307-10319 and

A6525-6528). By rotating the dial, the surgeon can increase or decrease the height of the spacer to any position between the fully contracted and fully expanded positions. *Id*.

Mr. Harris told Dr. Bianco that "he would present the drawings to a committee at Globus known as the 'new products committee,' which met monthly, and that a decision . . . would take two to four months." A112. Mr. Harris added that he would let Dr. Bianco know as soon as the committee made a decision, and that if the company decided to use his idea, "Dr. Bianco would be compensated in an amount that would be 'standard for a doctor presenting a new idea.'" A112-113 (citing A6533; A6536; A6702). At Mr. Harris's request, Dr. Bianco completed a Globus "new idea submission form." A113. A few days later, another Globus representative sent Dr. Bianco an email confirming that Mr. Harris had conveyed Dr. Bianco's submission and that "Globus Product Development engineers will review the ideas and sketches." *Id*. (citing A10307-10319); *see also* A10323-10327.

Over time, Dr. Bianco developed a close working relationship with Globus. "Dr. Bianco asked Mr. Harris on multiple occasions about whether Globus had made a decision regarding the development of his [product] idea." A113 (citing A6536-6537). "Each time, Mr. Harris told him that it was a complex project, that the company had to consider resources and potential return on investment, and that the company needed more time before" making a final decision. *Id*. (citing A6537).

Two years later, in late 2009, Mr. Harris returned Dr. Bianco's drawings. Mr. Harris told Dr. Bianco at that time that Globus was "not interested in this technology." A113 (citing A6536-6537; A6540-6542; A6814-6815).

Unbeknownst to Dr. Bianco, and despite Mr. Harris's claim that Globus was not interested, Globus had been working on a line of adjustable interbody spacers (culminating in the Caliber and Rise products) since October 2007, had built a prototype based on Dr. Bianco's drawings, and had filed a patent application for an adjustable interbody spacer. *Id*. (citing A6542-6543). Although Dr. Bianco had visited Globus's headquarters multiple times, and had provided input to Globus on other types of medical implants during that period, Globus never advised Dr. Bianco of the efforts related to his product idea. *Id*. (citing A6542-6543).

4. Globus's Use of Dr. Bianco's Trade Secret

Shortly after Globus received Dr. Bianco's drawings in July 2007, they were circulated to several Globus executives responsible for product development and fabrication. A114. Within a few months, Globus launched its first-ever project to design and manufacture an adjustable interbody spacer which eventually matured into the Caliber program in early 2009. A115. In addition to motivating Globus to pursue the Caliber and Rise projects, Dr. Bianco's drawings accelerated the product development process by providing the basic features of an adjustable interbody spacer to Globus engineers. *Id*.; A7034, A7039-7040. The district court found that the evidence supported a finding that Dr. Bianco's disclosures "were the source of the basic product idea for Caliber and Rise." A133.

Specifically, in October 2007, Bill Rhoda, a Globus executive who had reviewed Dr. Bianco's drawings, assigned engineer Ed Dwyer the task of developing an expandable interbody spacer. A115 (citing A7618-7619). Around the same time, Mr. Rhoda met with another executive Andy Lee, who during a brainstorming session about how to build a prototype of Dr. Bianco's idea, suggested a ramp-based concept as a potential way to better implement Dr. Bianco's ideas.te[1] *Id*. This was the first time anyone at Globus had thought of using a ramp-based expansion mechanism to expand and contract a spacer. *See* A7750-7751; 7753. That the drawings inspired the ramp-based mechanism is hardly disputable: Mr. Lee was reviewing Dr. Bianco's drawings when he came up with the modification, and the ramp-based version of Dr. Bianco's design was drawn on the back of the sheet of paper containing Dr. Bianco's drawings. A115

[1] "[A] ramp-based expansion mechanism consists of two ramps or inclined planes within the implant that can move laterally with respect to one another. Rotation of an actuator drives one of the ramps forward against the other. The forward motion of the ramp drives the top plate of the implant up and the bottom plate down, increasing the height of the implant. The height of the implant can be decreased by rotating the actuator in the opposite direction." A116.

(citing A6752-6773; A10323-10327); A133-134. Globus built a crude prototype of Mr. Lee's ramp concept but concealed it from Dr. Bianco. A115.

Chad Glerum, the Globus engineer who led the internal design efforts for the Caliber products, testified that the only person with whom he discussed the ramp-based expansion design was Mr. Rhoda, the same Globus executive present at the brainstorming session when the ramp-based concept was first suggested based on Dr. Bianco's drawings. A116. Dr. Bianco's drawings also accelerated the design and development efforts of Mark Weiman, the lead engineer on the Rise project, who collaborated with Mr. Glerum and admits that he used a modification of the same design in Rise. *Id.*; A7034, A7039-7040. The district court found that the evidence supported a finding that Globus relied on Dr. Bianco's drawings to develop the Caliber and Rise products, "even though [the Globus engineers] decided to use a ramp-based expansion mechanism instead of the scissor-jack mechanism depicted in Dr. Bianco's drawings." A134.

Like Dr. Bianco's proposed spacer, the Caliber and Rise "products are continuously adjustable and reversible interbody spacers." A108. "Because they are continuously adjustable, a surgeon can insert the spacer between two vertebrae while the spacer is at its minimum height and then expand the spacer to the precise height required for a particular patient when the spacer is in the appropriate position." *Id.* "Likewise, the surgeon can alter the initial positioning of the spacer during surgery by simply reducing the height of the spacer, moving it to a new position, and re-extending it to the required height." *Id*. "As a result, the patient is subject to less trauma during surgery than with a nonadjustable (or nonreversible) spacer, and successful fusion is more likely in view of the customized fit of the implant." *Id.*

In early 2011, Globus began marketing its Caliber product. A114. Dr. Bianco learned about the Caliber device for the first time when a Globus representative showed him a sample of the Caliber spacer and tried to sell it to him. *Id*. (citing A6550). Dr. Bianco became upset because the Caliber device embodied his concept for an adjustable interbody spacer and incorporated key features shown in his drawings. *Id*. (citing A6550-6551; A6816-6817).

Dr. Bianco confronted Mr. Harris regarding the Caliber device. A114 (citing A6557-6558). Mr. Harris responded that he was sorry and that "'[h]e understood that [Dr. Bianco] had intellectual property in this implant and that the company would make it right.'" *Id*. (alterations in original) (quoting A6558).

5. Commercial Success of the Caliber and Rise Products.

The Caliber and Rise line of products have been a commercial success for Globus. Globus's Disruptive Technologies segment, of which the Caliber and Caliber-L products are a part, [redacted] A828-829; A814; A7273. The Disruptive Technologies segment has also accounted for an increasing proportion of the firm's revenues, [redacted] A854.

Sales of the Caliber and Caliber-L products totaled [redacted] A854. [redacted] *Id.* Since their launch, the Caliber products have accounted for an increasing proportion of Globus's revenues, [redacted] *Id*.

Sales of Rise products totaled [redacted] A4704-4705. Those sales, in turn, [redacted] *Id*. Since launch, the Rise products have accounted for an increasing proportion of Globus's revenues, [redacted] *Id*.

6. Royalties Paid by Globus to Design Team Doctors and Others.

Globus assembles teams of surgeons to test and comment on products that Globus is developing. A117. Globus ordinarily pays a royalty between 0.5% and 1% of the net sales of the product to each surgeon team member that contributes ideas for tweaking a product. *Id*. Globus has paid surgeons a significantly higher royalty rate, between 5% and 6%, for bringing a new product idea to the table. A7176; A9243; *see also* [redacted]

B. Procedural History

Dr. Bianco filed this suit in federal district court in Texas alleging, among other claims, that by developing and commercializing the Caliber and Rise products, Globus misappropriated a trade secret he had disclosed in confidence to Globus. A204-32; *see also* A1449-570. Among other remedies, Dr. Bianco sought past and future damages, and preliminary and permanent injunctive relief.[2]

1. Liability

a. After a five-day trial, the district court instructed the jury, in pertinent part, that although "[t]here is no precise definition or formula for determining

[2] Although no longer at issue, Dr. Bianco also pleaded a correction of inventorship claim under 35 U.S.C. § 256. A204; A209; A1455-1456. "[A]n action to correct inventorship under § 256 'aris[es] under' the patent laws for the purpose of § 1338(a)." *Larson v. Correct Craft, Inc*., 569 F.3d 1319, 1325 (Fed. Cir. 2009) (alteration in original). This Court thus has exclusive jurisdiction over any appeal from the district court's final decision, including one unrelated to patent law issues. *See, e.g., Allergan, Inc. v. Athena Cosmetics, Inc*., 738 F.3d 1350, 1353 (Fed. Cir. 2013) ("We have exclusive jurisdiction over an appeal from a final decision of a district court (including one unrelated to patent issues) when 'patent law is a necessary element of one of the well-pleaded claims' in the complaint.") (citation omitted), *petition for cert. filed*, No. 13-1379 (U.S. May 15, 2014).

whether Dr. Bianco's disclosure actually constituted a trade secret," "the alleged trade secret consists of a combination of information" and must be "information that gives the trade secret owner an opportunity to obtain an advantage over competitors who do not know or use it." A6402-6403. The court also provided the jury with six factors that "may be relevant to determining whether Dr. Bianco's disclosures constituted a trade secret." A6403.[3] Globus did not object to any of those instructions.

The jury found that Globus misappropriated Dr. Bianco's trade secret. A6410; *see also* A107-156.

b. Globus moved for judgment as a matter of law under Federal Rule of Civil Procedure 50, both before (Rule 50(a)) and after (Rule 50(b)) the jury's verdict, challenging the sufficiency of the evidence of trade secret misappropriation. In its Rule 50(a) motion, Globus argued that "Dr. Bianco's ideas did not constitute a trade secret" because (1) all of the components of his ideas were already known, (2) a trade secret must be more than a "mere idea," and

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[3] The six factors are: (1) the extent to which the information is known outside Dr. Bianco's business; (2) the extent to which others involved in Dr. Bianco's business knew the information; (3) measures taken by Dr. Bianco to guard the secrecy of the information; (4) the value of the information to Dr. Bianco and his competitors; (5) the amount of effort or money expended by Dr. Bianco in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. A6403.

(3) Dr. Bianco's combination was "obvious in light of the prior art Scissor Jack device." A119. The district court denied that motion.

In its Rule 50(b) motion, Globus tried yet another theory: that the evidence was insufficient to support a finding that Dr. Bianco had disclosed all the elements of his trade secret to Globus. According to Globus, Dr. Bianco "defined his trade secret as a combination of distinct features identified by his technical expert, Dr. Carl McMillin." A118. Globus asserted that the drawings Dr. Bianco gave to Globus did "not disclose the combination of all of those features, and that Dr. Bianco did not offer sufficiently detailed evidence to show that he disclosed the combination of all of those features either through his drawings or through his interactions with Globus representatives." A118-119. Because Globus had not made that argument in its Rule 50(a) motion, the district court concluded it was waived. A119.

The district court rejected that argument on the merits as well, finding that it "conflates trade secret law and patent law principles." A120. According to the district court, "Dr. Bianco did not limit his trade secret claim to the specific combination of those features that his expert identified as having been disclosed to Globus," *id.*, and "[t]rade secret law generally does not require that a trade secret be defined by way of such limitations." *Id.* (citing the Restatement (Third) of Unfair Competition § 40 cmt. c (1995)). Accordingly, the district court held, "it was not necessary for the jury to conclude that every feature identified by Dr. Bianco's expert was disclosed in the drawings Dr. Bianco gave to Globus in order for the jury to find that Dr. Bianco conveyed the concept of an adjustable interbody spacer to Globus and that his idea for such a spacer was a trade secret." A121.

The district court also rejected Globus's passing contention that "Dr. Bianco's ideas were not entitled to trade secret protection because they were 'mere ideas.'" A123. The district court explained that both Texas law and the Restatement "support liability in the case of misappropriation of a 'mere idea,' if the idea was kept secret and liability was premised on a breach of confidence, as it was in this case." A122. The district court found, in any event, that Dr. Bianco's trade secret was not a "mere idea"; rather, "his drawings disclosed the fundamental concept for [an expandable interbody spacer] *along with several of its key features*." A124 (emphasis added); *see* A132 ("Given that Dr. Bianco's trade secrets included the idea for a continuously adjustable interbody spacer *with certain key features*, the jury was entitled to find that Globus used that trade secret when it began pursuing the development and marketing of such a device with many of the features identified in Dr. Bianco's drawings.") (emphasis added).[4]

2. Past Damages

a. After finding Globus liable for trade-secret misappropriation, the jury awarded Dr. Bianco $4,295,760 in past damages. A6411. That amount represented 5% of the net sales of the Caliber and Rise products up to the trial date, as those net sales had been calculated by Globus's damages expert. A109.

b. In its Rule 50(b) motion, Globus sought a new trial or remittitur as to past damages. Globus argued that the evidence did not support either the royalty base or the royalty rate that the jury had selected. The district court rejected those arguments.

As to the royalty base, Globus argued that it should have been apportioned relative to Dr. Bianco's contributions to the Caliber and Rise products, rather than comprising the total net sales from those products. The district court reasoned that Globus's apportionment argument, based on the "entire market value rule" from patent law, was inapplicable because the products at issue lacked any subcomponents; rather, Dr. Bianco's trade secret was in fact the idea for an

[4] The district court also rejected as "entirely without merit" Globus's two additional arguments challenging the misappropriation verdict: (1) insufficient evidence that Globus breached a confidential relationship with Dr. Bianco (A127-130); and (2) insufficient evidence that Globus made any use of Dr. Bianco's trade secret (A131-135). Globus does not press either of those issues on appeal.

adjustable interbody spacer as a whole. A146-147. To the extent the "entire market value" rule applied, the district court found that "Caliber and Rise products are the 'smallest salable units' that reflect the use of Dr. Bianco's trade secrets." A147. The district court explained that the jury's award of only 5% of Globus's profits to Dr. Bianco, rather than a disgorgement of all profits, meant that the jury had factored in Globus's contributions to the development and commercialization of those products. A148. According to the district court, further apportionment of the royalty base would "doubly discount Dr. Bianco's contributions to the overall product development of Caliber and Rise." A148-149.

As to the royalty rate, the district court found sufficient evidence, including "other royalty agreements Globus had entered into in that range," to support a reasonable royalty of 5-6%. A135. "Given that the evidence supported a finding that Dr. Bianco contributed the core idea for the Caliber and Rise products," along with several of those products' essential features, the court concluded that "the jury could reasonably find that Dr. Bianco's contributions were analogous to the contributions of those who had received such royalty rates from Globus in the past." *Id*.

3. Future Damages

a. Before trial, Globus asked the district court to prevent Dr. Bianco from presenting an expert opinion regarding future damages in the form of a lump-sum award, computed by applying a running royalty against product sales projected to occur over 15 years. Globus argued that the opinion was speculative and that the issue of future damages should be severed and tried, if necessary, in a separate post-trial proceeding like the one contemplated for patent infringement cases in *Paice LLC v. Toyota Motor Corp*., 504 F.3d 1293, 1313-1316 (Fed. Cir. 2007). The district court, exercising its discretion under *Daubert*, excluded the opinion regarding a lump-sum award of future damages.

During the trial, Dr. Bianco sought to offer evidence and an expert opinion that any future sales should be subject to a higher royalty rate than rates applied to past sales. Globus objected. Noting the existence of the pending request for permanent injunctive relief that would obviate the need for any calculation of future royalties, and consistent with Globus's pre-trial request, the district court severed and reserved the issue of future damages. A7109-7110.

After the jury's verdict, the district court denied Dr. Bianco's request for a permanent injunction, finding that *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006), called into question Texas case law presuming irreparable injury when a trade secret has been misappropriated. A62-63. But following the procedure approved in *Paice*, *supra*, the court granted Dr. Bianco's request that it consider an ongoing royalty in lieu of an injunction should Globus continue selling the products at issue. A71-72. At Globus's request (A8937), the court gave the parties 30 days within which to attempt to agree on an appropriate ongoing royalty rate. After the parties reached an impasse, the court held an evidentiary hearing followed by post-trial briefing. The court ultimately awarded Dr. Bianco a royalty of 5% on future net sales—the same rate awarded by the jury for past damages—of the Caliber and Rise products (as well as products "not colorably different") for a maximum period of 15 years—the standard duration of Globus's royalty agreements—from July 1, 2007. A109; A94.

The district court rejected Globus's argument that Dr. Bianco was not entitled to any remedy for his continuing injury from Globus's misappropriation. Globus argued primarily that Dr. Bianco's trade secret merely gave Globus a "head start" in its effort to produce an adjustable intervertebral spacer and that the benefit of the head start did not extend beyond the trial date. A78. The court found that Globus had waived that argument and also rejected it on the merits. A80-A81. In particular, the district court pointed to the testimony of Globus's expert, Dr. Ugone, that "the proper approach to calculating an ongoing royalty for trade secret misappropriation would be to continue the rate found applicable in measuring past damages." A82.

b. In its Rule 50(b) motion, Globus moved the district court to deny an award of future royalties to Dr. Bianco on the ground that such awards are impermissible under Texas trade secret law. A9604; A9624-9626. The court again rejected that argument. The court held that "under Texas law, courts fashioning equitable relief for trade secret misappropriation have the discretion to award such relief perpetually, that is, beyond the date of the verdict and even beyond the date when the trade secret is no longer a secret." A153 (citing *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958)).

The district court explained that even though trade secret misappropriation is not a continuing *tort*, it can result in a continuing *injury*. A152. Under Globus's theory that damages for a non-continuing tort end at trial, the court pointed out, "the reasonable royalty damages to which Dr. Bianco would be entitled would depend arbitrarily on the date of the jury's verdict," regardless of the damages he actually suffered. *Id.* The court concluded that "Globus's assertion that reasonable royalties are not appropriate for torts that are not 'continuing' is simply not grounded in law, logic, or principles of equity." A154.

The district court stated that, under Texas law, it was in fact Globus's burden "to show by competent evidence that an order of less duration than a permanent order will afford the injured party adequate protection." A153 (internal quotation marks and citation omitted). The court pointed to record evidence showing that Globus pays ongoing royalties for a term of 15 years, deeming it only "fair and equitable to award Dr. Bianco ongoing royalties that would ensure that his total compensation would be consistent with the jury's verdict and with the evidence of what he would have received had he reached an agreement with Globus regarding the use of his trade secrets in 2007." A154. The court added that "[i]t would be perverse for the Court to hold that, having denied injunctive relief because of the availability of a monetary award for future injuries, such a monetary award is not available after all." A153.

SUMMARY OF THE ARGUMENT

This Court should affirm the jury verdict that Dr. Bianco's disclosures to Globus concerning his proposed adjustable spacer device merit trade secret protection under Texas law, and affirm the award of past and future damages arising from Globus's misappropriation of that trade secret.

I. Globus's sole merits argument, to the extent preserved, is that Dr. Bianco's trade secret consists of only a "mere idea" unworthy of trade secret protection. The record amply demonstrates, however, that Dr. Bianco's trade secret consists not only of his core idea for a continuously adjustable interbody spacer but also of a description of its key features—illustrated in drawings and explained to Globus. Because the trade secret here is *not* limited to a "mere idea," resolution of Globus's theoretical legal question cannot affect the disposition of this appeal. In any event, binding precedent forecloses Globus's suggestion that Texas law trade secret law categorically excludes new product ideas from protection.

II. As to past damages, Globus argues that the evidence did not support the jury's selection of either the royalty base or the royalty rate. With respect to the royalty base, the jury adopted *Globus's* proposed royalty base—not Dr. Bianco's. The royalty base that Globus's expert employed was the net sales figure as defined in the royalty agreements Globus routinely enters into with physicians, and the jury awarded Dr. Bianco a past royalty amount equaling *exactly* 5% of that figure. With respect to the 5% royalty rate, the record is replete with Globus's prior licenses containing royalty rates between 5% and 6% for doctors, like Dr. Bianco, who contributed new product ideas to Globus. The jury's determination of the royalty base and the royalty rate therefore are supported by considerable evidence and are consistent with this Circuit's law on royalty damages.

III. Globus contends that the district court erred in awarding Dr. Bianco an ongoing royalty *in any amount* for Globus's continued use of Dr. Bianco's trade secret. But it was Globus that originally proposed that the district court assess future damages in a separate post-trial proceeding. And Texas trade secret law, considered in conjunction with general principles of equitable relief, contains no bar to ongoing royalties for continued use of a misappropriated trade secret. To the contrary, controlling Fifth Circuit precedent endorses the award of a running royalty measured through the life of a product derived from the misappropriation of another's trade secret.

STANDARD OF REVIEW

This Court reviews the grant or denial of a motion for judgment as a matter of law ("JMOL") under the law of the regional circuit; in this case, the Fifth Circuit. *SynQor, Inc. v. Artesyn Techs., Inc.*, 709 F.3d 1365, 1373 (Fed. Cir. 2013). The Fifth Circuit reviews the denial of a motion for JMOL *de novo*, *id.*, but "view[s] the evidence in the light most favorable to the jury verdict," *Sikes v. McGraw-Edison Co.*, 665 F.2d 731, 732 n.1 (5th Cir. 1982). Judgment as a matter of law is appropriate only if the Court finds that a "reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1); *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 841 (Fed. Cir. 2010), *aff'd*, 131 S. Ct. 2238 (2011).

The grant or denial of a motion for a remittitur or a new trial on damages is reviewed for an abuse of discretion. *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 66 (Fed. Cir. 2012); *Prytania Park Hotel, Ltd. v. General Star Indem. Co.*, 179 F.3d 169, 173 (5th Cir. 1999). The Fifth Circuit "has firmly established in previous cases that it will not reverse a jury verdict for excessiveness except on 'the *strongest* of showings.'" *Foradori v. Harris*, 523 F.3d 477, 504 (5th Cir. 2008) (emphasis added); *Wackman v. Rubsamen*, 602 F.3d 391, 404-405 (5th Cir. 2010). The denial of a new trial on damages will be reversed only if the award "clearly exceeds that amount that any reasonable man could feel the claimant is entitled to." *Wackman*, 602 F.3d at 404-05 (internal quotation marks and citation omitted). "To overturn or reduce a damages award, the 'extent of distortion [must] . . . be so large as to shock the conscience, so gross or inordinately large as to be contrary to right reason, so exaggerated as to indicated bias, passion, prejudice, corruption, or other improper motive.'" *Id*. (alterations in original) (citation omitted).

This Court reviews a district court's award of ongoing royalties as a form of equitable relief under an abuse-of-discretion standard. *Paice*, 504 F.3d at 1315.

ARGUMENT

I. TEXAS LAW PROTECTS DR. BIANCO'S TRADE SECRET

Globus does not contest the jury's findings underlying the misappropriation verdict: namely, that Globus acquired Dr. Bianco's trade secret through a confidential relationship or that Globus used that trade secret in the development of its products. Rather, Globus predicates its sole merits argument—one made only in passing in its Rule 50(b) motion (*see* pp. 21-22, *supra*)—on the assertion that Dr. Bianco's trade secret consists only of a "mere idea." But that predicate assertion is false. As the trial record and district court make clear, Dr. Bianco's trade secret consisted not only of his core idea for a continuously adjustable interbody spacer but also of a description of its key features. A124-A125.

Because the trade secret at issue is not limited to a "mere idea," resolution of Globus's theoretical question can have no bearing on the outcome of this appeal. In any event, Globus is wrong on the law: Texas trade secret law, consistent with the Restatement, protects product ideas such as the one developed by Dr. Bianco here.

A. Texas Trade Secret Law Does Not Exclude Protection of Ideas.

A trade secret under Texas law includes "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (citation omitted). To determine whether a trade secret exists, Texas courts apply a six-factor test. *Id*. Those six factors are:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of the measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended by him in developing the information;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. (quoting Restatement (First) of Torts § 757 cmt. b (1939)). Under Texas law, a plaintiff is not required to satisfy all six factors. *Id.* at 740 (explaining that the

Restatement (Third) of Unfair Competition "regards [the six-factor] test as relevant but not dispositive" and a "party claiming a trade secret should not be required to satisfy all six factors because trade secrets do not fit neatly into each factor every time."). Instead, because it is "not possible to state precise criteria for determining the existence of a trade secret," the factfinder independently evaluates these factors in view of the specific circumstances of the case. *Id.* (quoting Restatement (Third) of Unfair Competition § 39 cmt. d (1995)).

The existence of a trade secret is a question of fact for the jury. The Fifth Circuit recognizes that "[a] trade secret 'is one of the most elusive and difficult concepts in the law to define,'" *Tewari De–Ox Sys., Inc. v. Mountain States/Rosen, LLC*, 637 F.3d 604, 613 (5th Cir. 2011). Accordingly, "the question of whether certain information constitutes a trade secret ordinarily is best 'resolved by a fact finder after full presentation of the evidence from each side,'" *Ultraflo Corp. v. Pelican Tank Parts, Inc.*, 926 F. Supp. 2d 935, 958 (S.D. Tex. 2013) (citation omitted).

In this case, the district court properly instructed the jury on the definition of a trade secret under Texas law: "the alleged trade secret [in this case] consists of a combination of information. A trade secret is information that gives the trade secret owner an opportunity to obtain an advantage over competitors who do not know or use it." A6402. The district court further provided the jury the six factors quoted above that "may be relevant to determining whether Dr. Bianco's disclosure constituted trade secret." A124 (citing A6403). Globus neither challenged those jury instructions in the district court nor asks this Court to review them for plain error. In response to Globus's Rule 50(b) motion, the district court correctly held that Dr. Bianco's disclosures to Globus regarding the continuously adjustable spacer constitute a protectable trade secret under the Texas law principles on which the jury was instructed. A125.

Despite failing to object to the jury instructions, Globus now attempts to introduce a new limitation on the scope of a trade secret under Texas law. Relying on dicta from *Gonzales v. Zamora*, 791 S.W.2d 258 (Tex. App.—Corpus Christi 1990, no writ), Globus argues that a "mere idea" cannot be a trade secret. Br. 24-26. As an initial matter, Globus has waived any such argument. *See Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 753 (5th Cir. 1993) ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.") (citing FED. R. CIV. P. 51); *see also infra* note 5 (noting waiver of same argument in *Gonzales v. Zamora* for failure to object to relevant jury instruction).

On the merits, the district court considered the argument and correctly rejected it. As the district court explained, "[t]he court in *Gonzales* . . . was making the point that trade secret law does not create the right to exclude based on a property right in the idea itself, as in the case [of] patent law. Instead, trade secret law [can protect a 'mere idea'] if the idea is kept secret, and liability flows only from improper conduct in obtaining or using that idea." A121. As the court further explained, that formulation is consistent with the Restatement, which recognizes that "the idea that is claimed as a trade secret is not a protected property right in the abstract, but is protected only as long as it is kept secret and only against appropriation by improper means." A122; *see also* Restatement (First) of Torts § 757 cmt. a (1939). Both *Gonzales* and the Restatement thus "would support liability in the case of misappropriation of a 'mere idea,' if the idea had been kept secret and liability were premised on a breach of confidence," as in this case. A122. Accordingly, as the district court concluded, "[n]either *Gonzales* nor the Restatement stands for the proposition that a trade secret must be more than just an idea." *Id*.

Globus takes issue with the district court's reasoning based on Globus's assertion that comment (a) of Restatement § 757 "was not cited in *Gonzales*." Br. 28-29. But Globus is mistaken: the relevant passage in *Gonzales* expressly cites that very provision of the Restatement. *Gonzales*, 791 S.W.2d 258 at 264 (citing Restatement § 757 cmt. a). Indeed, Globus itself relied (unsuccessfully) on comment (a) of Restatement § 757 in its Rule 50(b) motion. *See* A9607 (citing to

Gonzales and Restatement § 757 cmt. a to support argument that "a trade secret must be more than a mere idea or a 'sparkle.'").[5]

Globus also relies on out-of-Circuit precedent such as *Richter v. Westab, Inc.*, 529 F.2d 896 (6th Cir. 1976), and *Hudson Hotels Corp. v. Choice Hotels Int'l*, 995 F.2d 1173 (2d Cir. 1993) (abrogated by *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000)), for the proposition that new product ideas are *never* entitled to trade secret protection. *E.g.*, Br. 24-27. At the outset, neither *Richter* nor *Hudson Hotels* applied Texas law. Those cases are further inapt because they did not turn on the blanket rule that Globus asks the Court to adopt in this case, *i.e.*, that a new product idea can never be protectable as a trade secret. For example, *Richter* held only that a "marketing concept"—applying fashion design to school binders—was not entitled to protection because "once it is implemented it is exposed for the world to see" and because it lacks both "novelty" and "concreteness." 529 F.2d at 900, 901; *see also Hudson Hotels*, 995 F.2d at

[5] In any event, the passage from *Gonzales* on which Globus relies is dicta at best. After all, the Texas appeals court in that case found that the evidence in fact supported the finding of protected "trade secret" status for the information at issue. 791 S.W.2d at 264-265. Notably, just as here, the appellant failed to object to the jury instructions on the definition of a trade secret and preserve the issue for review. *Id.* at 264 ("Appellants' objection did not state the specific reason for objecting to the last sentence of the definition of trade secret and he must have done so in order to preserve error."). For that reason, the *Gonzales* court "reject[ed] appellants' point of error because the complaint is not properly before us." *Id.*

1177 (holding that "[o]nce marketed," the claimed concept "could not constitute a protectable trade secret because, from that time forward, it could not be used secretly and continuously in business"). Globus never raised those distinct grounds before the district court or this Court, presumably because they are inapposite and conflict with controlling authority.

Indeed, Globus ignores binding Fifth Circuit precedent holding that new product designs are protectable as trade secrets in the pre-commercialization stage where—like here—they involve a concrete design concept or confer a competitive advantage. *See Sikes*, 665 F.2d at 733-734; *see also Triple Tee Golf, Inc. v. Nike Inc.*, 485 F.3d 253, 266-267 (5th Cir. 2007) (reading Texas's definition of trade secret "to cover any sufficiently realized [product] design, even if only executed in 'design sketches'"); *Taco Cabana Int'l, Inc. v. Two Pesos*, 932 F.2d 1113, 1123 (5th Cir. 1991) (citing several cases in which drawings constituted trade secrets).[6]

[6] *See also Ultraflo Corp. v. Pelican Tank Parts, Inc.*, 926 F. Supp. 2d 935 (S.D. Tex. 2013) (drawings and dimensional information of butterfly values qualify as trade secrets); *Genesco Sports Enter., Inc. v. White*, No. 3:11-CV-1345, 2011 WL 6593415, *8 (N.D. Tex. Oct. 27, 2011) ("Customer lists, client information, customer preferences, buyer contacts, pricing information, marketing strategies, blueprints, and drawings have all been recognized as trade secrets."); *Global Water Grp., Inc. v. Atchley*, 244 S.W.3d 924, 928 (Tex. App.—Dallas 2008, pet. denied) (same); *Grand Time Corp. v. Watch Factory, Inc.*, No. 3:08–CV–1770–K, 2010 WL 92319, *4 (N.D. Tex. Jan. 6, 2010) (same); *American Precision Vibrator Co. v. Nat'l Air Vibrator Co.*, 764 S.W.2d 274, 276–78 (Tex. App.—Houston [1st Dist.] 1988, no writ) (same); *Texas Integrated Conveyor Sys.*,

Indeed, the Fifth Circuit in *Sikes* expressly rejected application of *Richter* to such cases, 665 F.2d at 734, and emphasized (in denying a petition for rehearing) that Texas law does not "draw so rigid a distinction between new product ideas and trade secrets." *Sikes v. McGraw-Edison Co.*, 671 F.2d 150, 151 (5th Cir. 1982).

Similarly, the Texas Supreme Court has recognized that new product designs are valuable and entitled to trade secret protection, particularly in the context of licensee/licensor relationships. *See Hyde*, 314 S.W.2d at 776-777. In *Hyde*, the Court concluded that Huffines' new product idea, "[t]he details of [which] were unknown to Hyde Corporation until disclosed to its representatives during negotiations which culminated in a licensing agreement," qualified as "trade secrets belonging to Huffines." *Id.* at 777. Other courts applying the same six-factor test used in Texas have also determined that new product ideas can qualify as protectable trade secrets. *See, e.g.*, *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 722-723 (7th Cir. 2003).[7]

Inc. v. Innovative Conveyor Concepts, Inc., 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (same).

[7] Globus's reliance (Br. 24) on *Astro Technology, Inc. v. Alliant Techsystems, Inc.*, No. H-03-0745, 2005 WL 6061803, *7 (S.D. Tex. Sept. 28, 2005), is misplaced. In *Astro Technology*, the plaintiff attempted to claim trade secret protection on its general business plan for using fiber optics in operational rocket motors, but its idea was still in its very early stages. 2005 WL 6061803, at *1. It was in that limited context that the district court stated that "undeveloped ideas or plans" are not entitled to trade secret protection. *Id*. at *7.

B. Globus Mischaracterizes Dr. Bianco's Trade Secret As Limited To A "Mere Idea."

Even assuming *arguendo* that Texas trade secret law does not protect a "mere" idea, the evidence fully supports a finding that Dr. Bianco's trade secret consisted of more than that. As the district court reiterated in its Rule 50(b) opinion again and again, Dr. Bianco's trade secret comprised not only an idea for a continuously adjustable interbody spacer, but *that idea plus key product design features*—features that found their way into Globus's commercial products. A123-124 ("Dr. Bianco presented evidence that his drawings disclosed such a device *along with several key features* also found in Globus's Caliber and Rise products.") (emphasis added); A124 ("Dr. Bianco's theory all along has been that his drawings disclosed an implant for use in fusion surgeries, *along with certain key features*…") (emphasis added); *id*. ("[Dr. Bianco's] consistent claim has been that his drawings disclosed the fundamental concept for the implant *along with several of its key features*.") (emphasis added); A125 ("the idea for such a device *and a description of its key features* is a 'combination of information'") (emphasis added); *see also* A110 ("Dr. Bianco testified at trial that the concept of an adjustable interbody spacer *with certain features* . . . was his idea") (emphasis added); A115 ("the Caliber and Rise products still embodied his idea for an adjustable interbody spacer for use in fusion surgeries and contained *many of the features depicted in his drawings*") (emphasis added); A120 ("[B]y identifying at trial all the features of the idea he disclosed to Globus, Dr. Bianco was not describing 'narrowing limitations' that defined his trade secrets in the same manner that such limitations define the scope of patent claims.").[8]

Globus omits that complete and accurate description of Dr. Bianco's trade secret, as supported by the record. Instead, despite the fact that the evidence must be viewed in the light most favorable to the verdict (*see* p. 29, *supra*), Globus relies on an unduly sparse and specious characterization of the trade secret at issue. *E.g.*, Br. 18 ("There is no dispute that Bianco disclosed only a general and completely undeveloped product idea."). Stripped of that mischaracterization, Globus's legal claim falls apart, as it has never contended that a product idea *combined with several key features* falls outside Texas trade secret protection.

The best that Globus can do is to try to shift the argument. It contends that

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[8] Among the key features, Dr. Bianco's disclosures show a contracted insertion height for insertion into the disc space, implant optimization from endplate to endplate when expanded in the disc space, and controlled expansion and distraction (*i.e.*, the ability to turn the knob on the handle and increase the height of the implant). *See, e.g.*, A10307-10319; A10323-10327; A7923-7924. Globus's damages expert admitted that those are the marketable features of the accused Caliber product. A7829-7831. Likewise, Dr. Bianco's damages expert testified that reducing the risk of over-distraction—one of Caliber's touted features—comes directly from the controlled, continuous expansion and distraction feature that Dr. Bianco disclosed to Globus. A7923-7924. And even Globus concedes (Br. 25) that Dr. Bianco "could conceivably have trade secret rights in his particular design based on [the scissor-jack] concept." Although Globus claims it did not appropriate that entire design, that is relevant only to Globus's *use* of Dr. Bianco's trade secret—not to its existence.

the evidence "conclusively showed that [Dr.] Bianco never fully communicated his allegedly unique [redacted] combination to Globus, and that Globus did not misappropriate that [redacted] combination." Br. 32. Putting aside that Globus waived that argument (A118-119), it in no way forecloses the jury's consideration of the trade secret as the idea plus certain features (even absent a [redacted] combination"). Contrary to Globus's unsupported attempt to retry the facts (Br. 32-33), the jury could have readily concluded from the evidence at trial that Dr. Bianco's trade secret—the core idea plus key product features—accelerated the development of the Caliber and Rise products. *See, e.g.*, A133-134 (the jury heard evidence reflecting that "the Globus executives . . . relied on Dr. Bianco's concept when they decided to develop a continuously expandable spacer, a decision that ultimately led to the Caliber and Rise projects"); A115; A7033-7034; A7254-A7255; A7699-7700 (Globus included the marketable features, and even derived what it now considers to be the defining feature of the design, in a few minutes on the back of Dr. Bianco's drawings); *see also* A6752-6773; A10323-10327; pp. 13-16, *supra* (summarizing evidence of Globus's use of trade secret). That is more than enough to support the jury's finding of trade secret misappropriation in this case.

II. THE JURY'S PAST DAMAGES AWARD IS WELL SUPPORTED BY THE LAW AND EVIDENCE

Liability aside, Globus argues that the district court "abused its discretion" in denying its motion for a new trial or remittitur of damages. Globus objects to the jury's award of past royalty damages on two grounds: (1) that the jury "fail[ed] to properly apportion the royalty" base, and (2) that the royalty rate was "based on non-comparable licenses." Br. 19. Because the jury's determination of the royalty base and the royalty rate are supported by considerable evidence, neither objection warrants substituting Globus's judgment for that of the jury or district court. *See i4i Ltd.*, 598 F.3d at 857 ("Asking whether a damages award is 'reasonable,' 'grossly excessive or monstrous,' 'based only on speculation or guesswork,' or 'clearly not supported by the evidence,' are simply different ways of asking whether the jury's award is supported by the evidence).

A. Globus Proposed The Royalty Base Used By The Jury.

The jury adopted Globus's, not Dr. Bianco's, proposed royalty base. The royalty base that Globus's expert, Dr. Ugone, employed was the net sales figure as defined in the royalty agreements Globus routinely enters into with physicians, in this case totaling approximately $85,915,200.[9] The jury awarded

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[9] Dr. Ugone testified that this was the proper number to use to calculate royalties. A7804 (suggesting a royalty amount of $429,576 using a 0.5% royalty

Dr. Bianco past royalties of $4,295,760, which is *exactly* 5% of Globus's royalty base figure.[10] A6411.

Globus's newfound antipathy for its *own* proffered royalty base does not merit reconsideration on appeal. *See, e.g.*, *Key Pharms. v. Hercon Labs. Corp.*, 161 F.3d 709, 715 (Fed. Cir. 1998) ("Ordinarily, doctrines of estoppel, waiver, invited error, or the like would prohibit a party from asserting as 'error' a position that it had advocated at the trial."). In any event, the trial evidence amply supports that royalty base and the jury's adoption thereof.

B. The Accused Products Are The "Smallest Salable Units" That Reflect Use Of Dr. Bianco's Trade Secret.

Globus attacks the district court's conclusion that "the Caliber and Rise products are the 'smallest salable units' that reflect the use of Dr. Bianco's trade secrets." A147. The "smallest salable unit" concept arises ordinarily in the context of calculating damages in patent infringement cases. This Court has instructed that, in determining an appropriate royalty base, a jury should not use the value of the entire accused product unless the product in question constitutes

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rate). The undisputed evidence at trial was that $138,556,797 of revenue was associated with the Caliber and Rise products. A7159-7160.

[10] If the jury had adopted Dr. Bianco's expert's royalty base, the past damages award (based on the 5% royalty rate) would have been $5.2 million. A7182. As the district court stated, it is thus clear that the jury applied Dr. Bianco's proposed *rate* to Dr. Ugone's *royalty base* to arrive at $4,295,760. A6411.

the smallest salable unit containing the patented feature. *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1328 (Fed. Cir. 2014).

Globus argues that Dr. Bianco's idea was too vague and played a minimal role in the development of the accused products. Br. 36. Such arguments, however, are misdirected; rather than bear on the "smallest salable unit" determination, they address whether and to what extent Globus used Bianco's trade secret to develop the Caliber and Rise products. But Globus chose not to appeal those distinct liability issues. *See* pp. 13-16, *supra*; *see also* A125-A135 (rejecting those liability arguments).

The evidence before the jury demonstrated that Globus's Caliber and Rise spacer products as a whole originated from Dr. Bianco's trade secret and thus constitute the "smallest salable unit." Globus did not have an adjustable interbody spacer before it acquired Bianco's trade secret. *See* A6519-6520. Dr. Bianco's submission covered the concept and design of key features for an *entire* continuously adjustable and reversible interbody spacer device, not just a specific feature or component of a spacer device. Nor was it an improvement over something that Globus had already been working on. As indicated by Dr. Bianco's drawings, entitled "Adjustable Interbody Spacer," his trade secret encompassed the design for a complete product with certain marketable features reflected in the Globus products. *See* A6525;A7922-7924; A7829-7830; *see also* pp. 21-22, *supra* (quoting district court's description of trade secret). As the trial evidence confirms, it was Dr. Bianco's overall concept and design features that created the "basis for customer demand" for Globus's products. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318-1319 (Fed. Cir. 2011). The products at issue are the smallest saleable units that embody Dr. Bianco's trade secret.

C. The Jury Reduced The Overall Royalty To Account For Globus's Development and Marketing Contributions.

Globus contends that it was improper to "construe the scope of the technology encompassed by the idea, as though the idea were a patent claim." Br. 38. But Globus itself argued for application of the "entire market value" rule from patent law to this case. *See, e.g.*, A9622; A9697. As the district court explained, this case is markedly different from certain Federal Circuit cases that have found fault with a jury's award of a reasonable royalty based on the entire market value of a product. A146. That is because, as just explained, Globus's Caliber and Rise products themselves were the smallest salable units.

To be sure, that does not mean that Dr. Bianco is entitled to *all* profits arising from Globus's sale of those products. Rather than awarding him a complete disgorgement of Globus's profits from the Caliber and Rise products, the jury factored in evidence of Globus's contributions when it limited Dr. Bianco to a reasonable royalty. A7918. As the district court explained, further reducing the royalty base by apportionment would "doubly discount Dr. Bianco's contributions to the overall product development of Caliber and Rise." A148-149.

Globus appears to contend that in the context of trade secret misappropriation, further apportionment is necessary even where the chosen base already reflects the smallest saleable single-component unit and the royalty rate accounts for the defendant's contributions. But Globus cites no authority for such apportionment based on the exact "value of the information appropriated, and the role that information played in the profits made from the resulting products." Br. 38. Indeed, this Court rejected such an approach in *Lucent*: "the base used in a running royalty calculation can always be the value of the entire commercial embodiment, as long as the magnitude of the rate is within an acceptable range." *Lucent Techs., Inv. v. Gateway, Inc.*, 580 F.3d 1301, 1338-1339 (Fed. Cir. 2009); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1227 (Fed. Cir. 2014) ("Thus, where the entire value of a machine as a marketable article is 'properly and legally attributable to the patented feature,' the damages owed to the patentee may be calculated by reference to that value." (quoting *Uniloc USA*, 632 F.3d at 1320)).

D. Globus's Prior Royalty Agreements Supports The Jury's 5% Royalty Rate.

Globus also challenges the jury's selection of a 5% royalty rate as insufficiently supported by the evidence. The record easily defeats that challenge.

Globus argues that there is no evidence that Dr. Bianco would have ever demanded a 5% royalty rate in any hypothetical negotiation. But that repackages essentially the same unsuccessful challenge Globus made below to the royalty-rate analysis of Dr. Bianco's expert (Dr. Becker), and there is no reason for a different result on appeal. *See* A141-142. Dr. Becker's analysis assumed that any negotiation would factor in the significant commercial success that the Caliber and Rise products had enjoyed. A7178-7179. As the district court found, Globus never objected to Dr. Becker's opinions on these issues before trial or to his testimony at trial. The court thus properly held that Globus had waived its challenge to that testimony. A141. On the merits, as the district court concluded, Dr. Becker appropriately relied on a "book of wisdom" and properly took into account the commercial success of the accused products in opining on a hypothetical negotiation between the parties. A142; *see also Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766, 772 (Fed. Cir. 2014) ("[e]vidence of the infringer's actual profits generally is admissible as probative of his anticipated profits." (alteration in original) (quoting *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552, 1568 (Fed. Cir. 1984)). Dr. Becker's testimony therefore supports a 5% royalty rate under a hypothetical negotiation analysis.

Globus further argues that the district court erroneously allowed expert opinions based on non-comparable royalty agreements. As a threshold matter, Globus did not preserve any objection regarding the admission of or Dr. Becker's reliance on royalty agreements that included 5% royalty rates. The royalty agreements at issue were admitted without objection before trial. A7211. Dr. Becker testified at trial regarding those royalty agreements, again without objection from Globus. A7176.

Dr. Becker explained that Globus's agreements could be classified into two categories: one set of agreements with doctors who made "refinement contributions" to products that Globus had already conceived and developed, and a second set of agreements with doctors who brought a product concept to Globus. A7172; A7175. Other Globus witnesses confirmed that distinction. A7909-7910. The degree of comparability of the agreements was a factual question for the jury, and the district court correctly concluded that the jury was entitled to find that Dr. Bianco's contributions to the development of the Caliber and Rise products fell in the second category. As discussed above, the jury was presented with abundant evidence that showed Dr. Bianco contributed the concept and marketable design features of the adjustable interbody spacer, not just minor refinements to an existing product. A10316.

Globus argues that it paid higher royalties only to "competing medical device companies for completed products, in the process of acquiring those companies." Br. 41-42. That does not explain, however, a comparable royalty agreement with Dr. Vaccaro related to the XPand product—a product that Globus sponsored as similar to the Caliber and Rise products. A7176; A7877; *see also*

A11118. The jury was entitled to conclude that Dr. Vaccaro's agreement with Globus provided a benchmark royalty rate for what Globus and Dr. Bianco would have agreed upon. The only basis Globus offers to distinguish its license with Dr. Vaccaro is that Dr. Vaccaro was "a world-renowned doctor who was the sole surgeon on the design team." A9696. The jury, however, heard evidence that Dr. Bianco was also exceptionally credentialed and in fact had authored a book chapter on interbody spacers for Dr. Vaccaro. A6504-6505; A6563-6565. Parsing such factual issues is well within the jury's province.

Likewise, the jury was presented with Globus's agreement with a group of six or seven surgeons known as Big A Ideas. A7876; A9243; *see also* A13090. The group "came up with ideas on their own" and Globus "purchased one of those ideas." A7876. Globus's agreement with those surgeons provided for a 6% ongoing royalty in a situation analogous to Dr. Bianco's, *i.e*., the surgeons came up with the idea, which Globus purchased outright and developed into a commercial product. *Id*. The jury was entitled to reject Globus's attempts to distinguish the Big A Ideas agreement based on the fact that it involved more than one surgeon.

Other license agreements presented to the jury—including Globus's agreements with Facet Solutions for 5% and Soteira for 5%—involved situations similar to Dr. Bianco's, where Globus obtained rights to product ideas that were otherwise unavailable to Globus. A7176; *see also* A11001; A11078.

Globus contends that some of these other agreements were directed toward acquiring intellectual property in completed products. Br. 41-42. Again, the jury appropriately resolved such factual issues in Dr. Bianco's favor, and the district court correctly declined to second-guess the jury when denying Globus's motion for a new trial.

Globus relies heavily on license agreements paid to design team doctors to argue that those licenses establish the existence of a "standard" royalty rate of 0.5%. Br. 42-43. But the rates paid for these types of contributions vary as well; some were 0.5%, some were 0.65%, and some were 1.0%. *See* A7186. And, as the jury was well-entitled to determine, those royalties were paid to physicians on design teams who provided advice on relatively minor refinements to an already existing product. *See* A136-137. Globus currently asserts (Br. 40) that the design team doctors provided "meaningful contributions" to those products in exchange for a 0.5% royalty. The jury could decide, however, that Dr. Bianco's contributions (including but not limited to the core product idea) to the Caliber and Rise products were greater than those contributions—as it reasonably did. *See* A6909-6930 (declarations from Globus design team doctors stating that their contributions to the conception of the Caliber device were "not significant[]").[11]

Globus also complains that the starting point in Dr. Becker's royalty-rate analysis—in which Dr. Becker added up the royalties that Globus paid to other physicians—was "arbitrary." Br. 41. But it was far from arbitrary: Dr. Becker predicated his royalty analysis on the rationale that "Bianco's contribution to the development of the devices was much greater than that of the other surgeons, even viewed in the aggregate." A139 (internal quotation marks and citation omitted). The jury was entitled to accept this rationale in light of the evidence that Dr. Bianco contributed a whole new product concept and key design features that Globus did not have and had never previously considered. And, as noted above (pp. 47-48, *supra*), Dr. Becker's reasoning was supported by Globus's own royalty agreements with physicians who contributed to the conception of a new device.

Globus relatedly complains about Dr. Becker's reference to an additional 1% royalty to compensate Dr. Bianco in light of the commercial success of the Globus products. But Dr. Becker explained that the Caliber spacer's status as a "key differentiating product for Globus" justified such an enhancement. A7179. The jury was entitled to credit that testimony as well.

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[11] Although the same doctors later testified that their contributions had in fact been "significant" (A6909-6930, Answers to Question 4), the jury was well within its discretion to disregard such conflicting testimony or to resolve it against Globus.

As this Court has recognized, calculating a reasonable royalty "necessarily involves an element of approximation, and uncertainty," and "[q]uestions about what facts are most relevant or reliable to calculating a reasonable royalty are for the jury." *i4i Ltd.*, 598 F.3d at 856, 857-858. Dr. Becker's proposed royalty rate and the jury's award are well supported by evidence and fall within the range of royalties that Globus has paid in the past. *See C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1304 (Fed. Cir. 2000) (plaintiff's burden is only to show a reasonable basis for its computation of damages). Although Globus obviously wishes that the jury would have weighed the evidence differently, that is not a basis to overturn the jury's reasonable royalty-related determinations.

III. THE DISTRICT COURT'S FUTURE DAMAGES AWARD IS WELL SUPPORTED BY THE LAW AND EVIDENCE

Globus contends that the district court erred in awarding Dr. Bianco an ongoing royalty—of *any* amount. Texas law, as confirmed by trade secret precedent as well as general principles of equitable relief, contains no such bar.

A. The District Court Permissibly Adopted The Remedial Scheme Globus Had Proposed.

Globus originally proposed the remedial approach to future damages that the district court ultimately adopted. Now Globus objects that the district court abused its discretion by adopting that approach and awarding an ongoing royalty based on evidence offered in a post-trial proceeding. But it was Globus, not Dr. Bianco, that successfully urged the district court to bar Dr. Bianco from presenting future damages evidence until post-trial proceedings. Globus is thus poorly positioned to levy any such objection, which lacks merit anyway.

Globus repeatedly asked the district court before trial to reserve determination of future damages for a separate post-trial proceeding—such as those used in patent cases—should Globus's liability be established. A6215. For example, when seeking (successfully) pre-trial exclusion of Dr. Becker's projection for future royalties from Dr. Bianco's damages model, Globus stated: "Globus contends that future royalties should be handled in future proceedings should such become necessary." A1948 n.17. Globus confirmed its request in a supplemental filing. A4940 n.21.

Globus reiterated its position at the pre-trial hearing:

> With respect to future royalties, there are several problems that he has with it. But first of all, I guess in the patent cases that I've tried in this court, we have gone a damage number up through the date of trial. To the extent there are any future royalties going into the future, that was a separate preceding [sic] *that was dealt with afterwards about what the rate should be* or what the base should be and what the future of that product is.

A6215 (emphasis added). Both damages experts, moreover, treated an ongoing royalty as a proper measure of damages going forward. Dr. Ugone, Globus's expert, stated that "the royalty rate, if any, decided by the trier of fact at trial would also be the ongoing royalty rate for claimed future damages." A9257-9259 (discussing Dr. Ugone's expert reports).

Not once before trial did Globus argue, as it does now, that Texas law did not permit ongoing royalties in a trade secret misappropriation case or that a *Paice*-type proceeding would be improper. Globus's first post-trial argument, one that it does not make to this Court, was that Dr. Bianco's damages should be limited based on a "head start" theory. *E.g.*, A78. Given Globus's reliance on a reasonable-royalty model throughout the case, the district court found this argument to be waived. A141. Regardless, the district court explained that Texas law allowed an award of reasonable royalty damages extending beyond the period of the "head start" gained by the defendant through its trade secret misappropriation. A153-154 (citing *Sikes v. McGraw-Edison*, 665 F.2d 731 (5th Cir. 1982)); *see* p. 25, *supra* (discussing district court's rejection of "head start" argument).

In sum, Globus has invited any error about which it now complains, and the district court properly rejected Globus's post-trial arguments. *Munoz v. State Farm Lloyds*, 522 F.3d 568, 573 (5th Cir. 2008) ("[I]nvited error doctrine provides that 'a party may not complain on appeal of errors that he himself invited or [persuaded] the court . . . to commit.'"); *see also Flores v. Cameron County*, 92 F.3d 258, 270 n.9 (5th Cir. 1996); *Fitch v. Pub. Util. Comm'n*, 261 F. App'x 788, 794 (5th Cir.

2008).

B. Texas Law Permits The Award Of An Ongoing Royalty As Equitable Relief.

Globus declares that "[a] trade secret holder's right is violated only once, by the acquisition of the trade secret in breach of confidence or by improper means." Br. 45-46. From that premise, Globus argues that because its misappropriation of Dr. Bianco's trade secret was complete upon its decision to pursue development of his idea of a continuously adjustable interbody spacer, no forward-looking remedy is permitted. *Id*. That conclusion defies "law, logic, [and] principles of equity." A154.

Globus's argument conflates the difference between a continuing tort and continuing injury: while the tortious conduct (trade secret misappropriation) may be complete, the injury to Dr. Bianco from that misappropriation continues. *See Daboub v. Gibbons*, 42 F.3d 285, 291 (5th Cir. 1995) (stating that even though the tort may have been committed once, plaintiff's damages continue to increase each time an infringing product is sold). This is particularly true where, as here, both parties agreed that the damages could be measured by reference to a royalty, and the hypothetical negotiation would result in a running royalty. As a result, Globus's purported distinction between patent cases and trade secret cases does not exist. Texas law permits a court to award prospective—even perpetual—injunctive relief that goes well beyond the initial misappropriation, beyond the date of the verdict, and beyond the date when the trade secret is ceases being a secret. *See Hyde*, 314 S.W.2d at 776; *see also Elcor Chem. Corp. v. Agri-Sul, Inc*., 494 S.W.2d 204, 214 (Tex. App.—Dallas 1973, writ ref'd n.r.e.) (agreeing that, in addition to injunctive relief, damages in a case involving the wrongful use of a trade secret could include "reasonable royalty on sales of the defaulting fiduciary"). Such relief is consistent with principles of Texas law that equitable relief must be "full and complete." *Halliburton Energy Servs., Inc. v. Axis Techs., LLC*, 444 S.W.3d 251, 257 (Tex. App.—Dallas 2014, no pet.) (concluding that the trial court abused its discretion in refusing to grant plaintiff a perpetual injunction, and stating that scope of the injunctive relief "must, of necessity, be full and complete so that those who have acted wrongfully . . . will be effectively denied the benefits and profits flowing from the wrongdoing").[12]

Because Globus's product sales could be enjoined perpetually under Texas law, the district court reasoned, Texas law necessarily permits a hypothetical negotiation that would compute a royalty for the lives of the products at issue.

[12] More generally, a court in equity can award damages in lieu of an injunction because of relative hardship or a countervailing public interest. Restatement (Second) of Torts § 951 cmt. a (1979). Courts have recognized such authority in various areas of the law. *See, e.g.*, *City of Harrisonville v. W.S. Dickey Clay Mfg. Co*., 289 U.S. 334, 338 (1933); *Boomer v. Atlantic Cement Co*., 257 N.E.2d 870 (N.Y. 1970); *Monroe Carp Pond Co. v. River Raisin Paper Co*., 215 N.W. 325, 328 (Mich. 1927); *Quality Excelsior Coal Co. v. Reeves*, 177 S.W.2d 728, 734 (Ark. 1944).

A153-154 (citing *Sikes*, 665 F.2d at 737). That reasoning also follows from Fifth Circuit precedent applying Texas law. In *Sikes*, the defendant agreed to a two-year period of confidentiality to protect plaintiff's trade secret. 665 F.2d at 732-733. Applying Texas trade secret law, the Fifth Circuit affirmed an award of reasonable royalty damages extending beyond those two years for defendant's breach. *Id*. at 737. If the parties had agreed to a royalty, the Fifth Circuit reasoned, it was "exceedingly unlikely that any such per-unit royalty . . . would have been so arranged as to terminate after two years or have been payable for *any term other than the life of*" the offending products. *Id*. (emphasis added). *Sikes* therefore strongly supports the district court's conclusion that Texas law permits a reasonable ongoing royalty "by reference to the most likely period for which it would have been paid," *id*., the period that would have been covered had Dr. Bianco and Globus come to an agreement when Dr. Bianco first disclosed his ideas to Globus. A154. Remarkably, despite the district court's reliance on that controlling Fifth Circuit precedent (A153-154), Globus does not even mention *Sikes* in its brief.

Nor is the concept of ongoing monetary relief for trade secret misappropriation unique to Texas law. As Globus concedes (Br. 47 n.2), the Uniform Trade Secrets Act (UTSA) expressly allows for an award of ongoing royalties. *See* U.T.S.A. § 2(b). The UTSA—not controlling here but based on common-law principles—provides that "an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited." *Id.* The Uniform Law Commissioners included that provision because common law developing under the Restatement supported that approach. *See* U.T.S.A., Prefatory Note ("The Uniform Act codifies the basic principles of common law trade secret protection, preserving its essential distinctions from patent law."); *see also id*. § 2 cmt. ("Injunctions restraining future use and disclosure of misappropriated trade secrets frequently are sought."); *id.* ("When Section 2(b) applies, a court has discretion to substitute an injunction conditioning future use upon payment of a reasonable royalty for an injunction prohibiting future use."). Courts in other jurisdictions similarly have ordered ongoing accountings in the trade secret context when an injunction is denied. *See, e.g.*, *Republic Aviation Corp. v. Schenk*, 152 U.S.P.Q. 830, 1967 WL 7717, *8 (N.Y. App. Div. Jan. 13, 1967) (denying injunction based on potential danger to military personnel in Vietnam, but ordering that "further accountings may be directed to be had for the purpose of computing plaintiff's damages resulting from inclusion of plaintiff's proprietary data and confidential information into [defendant's system]"); *Irving Iron Works v. Kerlow Steel Flooring Co.*, 126 A. 291 (N.J. 1924) (ordering an ongoing accounting of profits from ongoing sales in lieu of an injunction); *Structural Dynamics Research Corp. v. Engineering Mechs.*

Research Corp., 401 F. Supp. 1102, 1120 (E.D. Mich. 1975) (awarding ongoing royalty in the amount of 15% on all sales of defendant's product for three years).

Globus's position that the denial of an injunction deprives Dr. Bianco of any remedy for his ongoing injury not only defies all that precedent, but it runs counter to Globus's own practice: a royalty over the life of a product capped at 15 years is the preferred method that Globus employs to compensate physicians and surgeons who participate on design teams. *See, e.g.*, A11117-11122; A11058-110116. And it violates basic fairness to boot: the district court's denial of Dr. Bianco's request for a permanent injunction was premised on the availability of an ongoing royalty to compensate Dr. Bianco for his future injuries. A64; A151-153. If this Court concludes the district court's award of an ongoing royalty was somehow improper, then it should at least remand the case to allow the district court to issue the permanent injunction.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's final judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court of the United States Court of the Federal Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: April 23, 2015

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 12,952 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.