

No. 20-362

IN THE
Supreme Court of the United States

COCHLEAR CORPORATION, COCHLEAR LTD.,
Petitioners,

v.

ALFRED E. MANN FOUNDATION FOR
SCIENTIFIC RESEARCH, ADVANCED BIONICS, LLC,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**REPLY IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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INTRODUCTION

Respondents' brief in opposition nowhere denies that the petition raises issues of great importance to patent law. Nor could it, given that use of a later-arising stock valuation added an eye-popping \$80 million to the verdict below, and the ultimate \$280 million judgment was allowed to stand even though two of the four patent claims on which the verdict rested were later invalidated. Similar distortions of damages awards recur often in patent litigation. Patent holders often use later valuation increases to inflate hypothetical royalty amounts under the Federal Circuit's "Book of Wisdom." And patent holders often assert multiple patent claims tried to general verdicts only to see some claims invalidated post-verdict. The rules of law applied below thus have multi-million-dollar practical consequences that warrant the Court's attention.

Respondents also have no answer to the conflicts set forth in the petition. They do not address any of the seven ways the Book of Wisdom conflicts with *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933). And they do not dispute that the refusal to order a new trial on damages here reflects a five-way circuit split on the general verdict rule. As *amici* intellectual property professors explain, "there is a split among the circuits on how to treat general jury verdicts when part of the basis for that verdict is overturned on appeal," and that split has special salience for patent cases because "[i]t will almost never be possible to tell how much of a general verdict is attributable to an invalidated patent in cases where more than one patent is at issue." Brief of Amici Curiae Intellectual Property

Professors In Support of Petitioners (“Lemley Br.”) at 2, 3.

Instead, the brief in opposition presents a barrage of factual details designed to divert attention from the questions presented and to paint this case as a poor vehicle for addressing them. That effort fails. This Court has not hesitated to review the Federal Circuit’s summary affirmances in appropriate cases. *See infra* p. 4. Petitioners preserved all the questions presented, including whether the courts below applied the correct waiver standard. And respondents have no basis in the record to speculate that the Book of Wisdom played no role in the verdict, or that the jury might have tacitly attributed all damages to the surviving patent claims alone.

Finally, respondents greatly exaggerate their inventive contribution. The patents here did not (*contra* BIO 1) “introduce[] back-telemetry.” Back-telemetry has been in use (including by petitioner) since the 1980s. C.A. App. 1672-77. The surviving claims here relate merely to one back-telemetry method and device that allow a doctor to obtain data from a cochlear implant. C.A. App. 288-89; *see* Pet. 7. The Court should review the rules of law that allowed supposed use of such a narrow invention to balloon into a \$280 million judgment.

The petition should be granted.

ARGUMENT

I. Respondents Fail To Defend The Federal Circuit's "Book of Wisdom"

A. The Decision Below Conflicts With *Sinclair*

Contrary to respondents' suggestion (BIO 12), the first question presented is directed not to fact-bound error correction but rather to the Federal Circuit's mischievous rule of law that evidence of patent value that long postdates a hypothetical negotiation may be used even where (i) contemporaneous market valuation is available, (ii) the later-arising evidence is not closely tied to the value of the patent, and (iii) the later-arising evidence was not reasonably foreseeable. That interpretation of the "Book of Wisdom" conflicts with *Sinclair* in multiple specific ways. *See* Pet. 13-16. Respondents have no answer.

Respondents further err in contending (BIO 13-14) that the Federal Circuit's decisions in *Fromson v. Western Litho Plate & Supply Co.*, 853 F.2d 1568 (Fed. Cir. 1988), and *Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766 (Fed. Cir. 2014), are consistent with *Sinclair*. Those decisions simply underscore how far the Federal Circuit has departed from *Sinclair*. *Fromson* requires consideration of after-arising evidence that "could not have been known to or predicted by the hypothesized negotiators." 853 F.2d at 1575. And *Aqua Shield* is one of many cases that constrain the ability of defendants more than plaintiffs to rely on the Book of Wisdom. Neither rule finds support in *Sinclair*. And the Federal Circuit's asymmetrical approach favoring patent holders only underscores the need for review. *See* Pet. 16-17.

Implicitly conceding that *Sinclair* does not permit consideration of unforeseeable future valuation evidence, respondents argue (BIO 15) that the 2004 price of Advanced Bionics stock was supposedly foreseeable in 1999 because AMF's business model was to license patents for stock, AMF expected the stock to have "substantial worth," and AMF's founder believed it would later sell the stock to a larger company. But a generalized belief that a stock might appreciate cannot support a specific dramatically higher price five years later, and none of those facts remotely suggests that AMF or Advanced Bionics could have foreseen in 1999 that a \$2.80 per-share stock price would somehow increase by 2004 to seven and a half times that amount (*see* Pet. 5-6)—a price that even AMF's founder called "very rich"(C.A. App. 1177).

B. This Is A Good Vehicle To Address The Book of Wisdom

Contrary to respondents' suggestion (BIO 8-9, 12), the Federal Circuit's use of its controversial Rule 36 summary affirmance procedure is no bar to this Court's review. This Court has not hesitated to grant certiorari to review such summary affirmances in appropriate cases. *See, e.g., Oil States Energy Servs. LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018); *cf. Shapiro v. McManus*, 577 U.S. 39 (2015) (reversing summary affirmance by the Fourth Circuit); *Christeson v. Roper*, 574 U.S. 373 (2015) (reversing summary affirmance by the Eighth Circuit). A Rule 36 affirmance allows the Federal Circuit "to dispense with issuing an opinion that would have no precedential value." *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1556 (Fed. Cir.

1997). The summary affirmance here reflects the Federal Circuit's view that its Book of Wisdom law is so established as to not warrant an opinion.

Respondents also err in suggesting (BIO 9-11) that the Book of Wisdom evidence was not the true ground for the verdict here. Respondents now speculate that the jury might have reached its award based on the testimony of respondents' damages expert Ms. Elsten about her "income approach." That argument is waived, as respondents never argued at the Federal Circuit that the use of the Book of Wisdom was harmless error. In any event, an improper theory can prejudice a verdict even if there is other proper evidence to support it. *ATD Corp. v. Lydall Inc.*, 159 F.3d 534, 549 (Fed. Cir. 1998). Here, the improper Book of Wisdom theory necessarily affected the verdict. Ms. Elsten testified that her "market approach," which relied on the Book of Wisdom, resulted in a royalty rate "[f]rom 4.6 to 8.8 percent" (C.A. App. 1578), while her "income approach" generated a rate "roughly in the 16 to 18 percent range" (C.A. App. 1591-92). Ms. Elsten opined that even a royalty rate of "9 percent is too high" (C.A. App. 1605) and therefore settled in her final opinion on a 7.5% rate—exactly the rate the jury adopted. The jury thus clearly did not adopt Ms. Elsten's "income approach." And the use of the Book of Wisdom was plainly prejudicial; had the jury relied on contemporaneous rather than a future stock value, it would have chosen a royalty rate between 2.5% and 3% and a verdict approximately \$80 million lower than the \$131.2 million it awarded. *See* Pet. 4-6.

Finally, it is absurd for respondents to suggest (BIO 12) that “[t]estimony by petitioners’ expert” supports the verdict by suggesting a 7% average royalty rate. The cited passage of the district court’s opinion (App. 84a n.22) refers not to the expert’s testimony but rather to a study in the expert’s book published in 2018, *four years after the trial*. The jury could not have adopted the 7% royalty rate from testimony petitioner’s expert never offered and a study that was never introduced.

The Book of Wisdom issue is thus squarely presented here.

II. Respondents Fail To Defend The Deviation From The General Verdict Rule Below

Respondents fare no better in proffering (BIO 16-28) a slew of vehicle objections to the second question presented, which undeniably presents a five-way circuit split and has great practical importance, as the brief of *amici* intellectual property professors emphasizes.

A. The Judgment Below Conflicts With The General Verdict Rule

Respondents err in suggesting (BIO 26) that *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), and *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), militate against review. Neither case held acceptance of a general verdict to be harmless error. *Memphis* reiterates that ambiguities in general verdicts such as the one below are “difficult, if not impossible, to correct without retrial.” 477 U.S. at 312. And *Exxon* requires a new trial when the court cannot determine if “in view of

the general verdict returned whether the jury imposed [damages] on a permissible or an impermissible ground.” 554 U.S. at 482 n.3 (quoting *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 11 (1970)).

This is just such a case, and nothing in the record supports respondents’ assertion (BIO 27) that “the jury *necessarily* concluded that 7.5% is the rate for infringement of the ’616 patent alone.” To the contrary, respondents’ expert assumed that *both* the ’691 and the ’616 patents were valuable and infringed and never allocated between the two. C.A. App. 1563, 1614-15, 1628. And while it is true that both experts used a constant royalty rate even though the ’691 patent expired during the license period, it is absurd to infer from that fact that the ’691 patent added no value. Constant royalty rates are a standard feature of multi-patent portfolios, used for administrative convenience even though patents in a portfolio may expire at different times. *E.g.*, Wei-Lin Wang, *A Study on the Legality of Royalty Collection Clauses After Expiration Of Patent Rights*, 13 J. Marshall Rev. Intell. Prop. L. 213, 220 (2016); C.A. App. 3886. And if anything it was the broader ’691 implant patent and not the narrower ’616 testing patent that blocked the use of the infringing back-telemetry feature—contrary to respondents’ baseless assertion (BIO 27) that they are “each blocking patents.” *See* Pet. 7.

Further, as *amici* note, respondents’ position contradicts the settled presumption that “a holder of a valid and infringed patent has inherently suffered legal damage.” Lemley Br. 4 (quoting *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1330 (Fed. Cir. 2014)).

As *amici* explain (Lemley Br. 4), “under Federal Circuit law the proper damage award for any patent is never zero. The logical corollary of that conclusion is that eliminating a patent from the case must necessarily reduce the jury’s general damages award.”

B. Use Of A General Verdict Form Below Supports Granting—Not Denying—Certiorari

Respondents further err in suggesting (BIO 17-20) that review is precluded because petitioner did not request a verdict form particularizing damages for each patent claim. This conspicuously ignores the second circuit split highlighted in the petition on the very question whether such a request is required to avoid waiver of the right to correct an erroneous jury verdict. *See* Pet. 31; Lemley Br. 6. This case is an ideal vehicle to resolve that split.

Moreover, respondents ignore the compelling practical reasons to permit a party to request a general verdict form without being deemed to have waived a new trial if one basis for the verdict is later invalidated. The waiver rule applied below, if left to stand, would give defendants every incentive to request complicated special interrogatories to cover every conceivable theory of liability in case one is later invalidated. In complex cases involving multiple patents, multiple claims, and multiple different accused products, this would result in verdict forms of nearly infinite degrees of complexity. *See Gillespie v. Buck & Co.*, 386 F.3d 21, 31 (1st Cir. 2004) (rejecting waiver because “[i]n some cases special verdicts make sense but there may be others where using them, to a sufficient level of detail, is

infeasible or otherwise undesirable”). For example, petitioner here proposed (but was denied) a verdict form that required finding separate damages attributable to each accused product. *See* App. 60a-65a. Further requiring the jury to separately find damages for each asserted patent claim would have exponentially increased the risk of jury confusion and inconsistent findings. Such highly particularized verdict forms would be unhelpful to both juries and trial courts.¹

Finally, respondents err in suggesting (BIO 24-25) that the verdict form here really was a special and not a general damages form. The form asked the jury to calculate damages if it found infringement of “a valid claim of either the ’616 patent or the ’691 patent.” C.A. App. 253. That meant that, if the jury found infringement of both patents (as it did), it would award a single damages amount. It would have made no difference if the form had, as respondents suggest (BIO 25), “asked the jury to award a single sum of damages for infringement of *all* valid claims of *both* the ’616 patent *and* the ’691 patent.” Either way, the general verdict rule is implicated because it is not possible to determine

¹ *See Panther Pumps & Equip. Co. v. Hydrocraft, Inc.*, 468 F.2d 225, 228 (7th Cir. 1972) (Stevens, J.) (“When only two or three narrow issues of fact, such as the date of invention or perhaps the date of first public sale, determine the issue of patent validity, it may be entirely appropriate to submit special interrogatories to the jury. But if, as in this case, one party contends that as many as 32 separate fact questions must be resolved, the trial judge certainly may consider it inappropriate to use the special interrogatory procedure.”).

what damages the jury would have awarded for infringement of the '616 patent alone.

C. There Was No Appellate Waiver

Respondents finally err in arguing without citation (BIO 23) that petitioner supposedly waived objection before the Federal Circuit to application of the Ninth Circuit waiver rule as set forth in *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980). To the contrary, petitioner expressly argued in the Federal Circuit that “the district court erroneously relied on *Traver*,” and “abused its discretion in denying a new trial on damages” because “AMF’s damages analysis became legally flawed when [the court] invalidated claims 6 and 7 of the '691 patent.” C.A. Dkt. 24 at 24, 49. Accordingly there was no appellate waiver.

Petitioner cannot be faulted for not going further and asking the Federal Circuit to overrule the regional circuit law governing its review of procedural issues like waiver and harmless error exceptions to the general verdict rule. *See Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75 (Fed. Cir. 1984), overruled on other grounds, *Richardson–Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). The Federal Circuit has no authority to overrule Ninth Circuit decisions. And parties are not required to make futile arguments to preserve them for review. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (issue not waived where argument “would be futile” because prior circuit “precedent precluded jurisdiction over petitioner’s . . . claims, and the panel below had no authority to overrule” precedent).

The departure below from the general verdict rule is thus squarely presented for review.

III. Respondents Do Not Justify The Failure to Apportion

Respondents do not deny that their damages expert attributed the entire value of the Advanced Bionics license to just the two asserted patents and applied her royalty rate to the entirety of the accused product's revenue. That conflicts so plainly with this Court's instruction that a patentee "must in every case" apportion damages, *Garretson v. Clark*, 111 U.S. 120 (1884), that it warrants summary reversal. Respondents fail to show otherwise.

A. The Judgment Conflicts With *Garretson*

Respondents first err in contending (BIO 30-31) that the judgment supposedly complies with *Garretson* because their damages expert Ms. Elsten apportioned her "income approach." Even assuming that were true, it does not excuse her failure to apportion her "market approach," which undeniably affected the verdict (see *supra* p. 5).

To justify that lack of apportionment, respondents cite evidence (BIO 32-33) that the patents were valuable and contributed to their profits. But they cite no evidence that the *entire value* of the Advanced Bionics license or the accused products was attributable to the '616 patent. Even Ms. Elsten assumed that the '691 patent claims—which were later invalidated—were both valuable and infringed. See *supra* p. 7. There is therefore no evidence apportioning damages solely to the '616 and '691 patents, much less to the '616 patent alone.

B. The Apportionment Argument Is Preserved

Contrary to respondents' assertion (BIO 29), petitioner raised apportionment in both the district and appellate courts. It argued to the Federal Circuit that respondents "failed to apportion the value of the relevant patent and thus obtained damages for features it did not invent" and "improperly used the entire sales price of Cochlear's products in calculating the damages base without meeting the legal requirements for doing so." C.A. Dkt. 24 at 1. The same arguments were presented to the district court multiple times. C.A. App. 4558, 4566-81, 4622-28. And petitioner argued to the Federal Circuit that the issue had not been waived. C.A. Dkt. 32 at 22-23. Summary reversal is warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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