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11 Attorneys for Plaintiff
VARIAN MEDICAL SYSTEMS, INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 VARIAN MEDICAL SYSTEMS, INC.,

16 Plaintiff,

17 v.

18 VIEWRAY, INC., and
19 VIEWRAY TECHNOLOGIES, INC.,

20 Defendants.

Case No. 3:19-cv-05697-SI

**JOINT STIPULATION RE LEAVE TO
AMEND CONTENTIONS; ~~[PROPOSED]~~
ORDER (L.R. 7-12)**

Judge: Hon. Susan Illston

Date Filed: September 10, 2019

Trial Date: None Set

1 Plaintiff Varian Medical Systems, Inc. (“Varian”) and Defendants ViewRay, Inc.
2 and ViewRay Technologies, Inc. (collectively, “ViewRay”) (together, the “Parties”)
3 respectfully move under Patent Local Rule 3-6 for leave to amend their respective
4 infringement and invalidity contentions. Neither party requests modification of the case
5 schedule with respect to claim construction set forth in Dkt. No. 63.

6 Patent Local Rule 3-6 states that amendment “may be made only by order of the
7 Court upon a timely showing of good cause.” The rule further enumerates “[n]on-
8 exhaustive examples of circumstances that may, absent undue prejudice to the non-
9 moving party, support a finding of good cause,” including the “[r]ecent discovery of
10 material, prior art despite earlier diligent search,” and “[r]ecent discovery of non-public
11 information about the Accused Instrumentality which was not discovered, despite diligent
12 efforts, before the service of the Infringement Contentions.” Patent L.R. 3-6(b) and (c).

13 Varian served ViewRay with its initial infringement contentions on December 20,
14 2019, in which Varian asserted claims 12–16 and 19–22 of U.S. Patent No. 8,637,841
15 (“the ’841 patent”) and claims 1–3, 5–8, 10, and 13–14 of U.S. Patent No. 9,082,520
16 (“the ’520 patent”).

17 At the time Varian served its infringement contentions, ViewRay had not yet
18 produced any non-public technical information in discovery about the design and
19 operation of the Accused Products. Varian’s contentions were therefore based solely on
20 public information about the Accused Products. The same day Varian served its initial
21 contentions, Varian served ViewRay with a request for physical inspection of the
22 Accused Products.

23 ViewRay served its invalidity contentions on February 3, 2020, and made its
24 required production of non-public technical documents and information pursuant to
25 Patent L.R. 3-4 that same day.

26 After meeting and conferring, the parties agreed that Varian would conduct a
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1 physical inspection on March 4, 2020. Varian obtained significant non-public
2 information during its inspection. Given the non-public nature of the information, Varian
3 could not have included it in its initial infringement contentions. Accordingly, one day
4 after the inspection, on March 5, Varian informed ViewRay that it intended to amend its
5 contentions based on the information discovered during the inspection. Two business
6 days later, on March 9, Varian identified the claims that Varian would seek to add to its
7 contentions. On March 11, one week after the inspection, Varian provided ViewRay with
8 a redlined copy of its initial infringement contentions that showed its proposed
9 amendments, which added Claims 1, 2, 3, and 4 of the '841 patent and conformed several
10 contentions for the previously Asserted Claims.

11 After reviewing Varian's proposed amendments and meeting and conferring with
12 Varian, ViewRay has agreed to not oppose Varian's motion to amend its infringement
13 contentions as proposed in the contentions served on March 11, provided that ViewRay
14 could likewise amend its invalidity contentions with respect to Claims 1–4 of the '841
15 patent and to add one additional reference as background material. ViewRay has
16 separately reserved its right to challenge the theories of infringement laid out in Varian's
17 proposed amended contentions, including with respect to the newly-asserted claims.

18 The parties subsequently met and conferred with respect to the reciprocal
19 amendment to ViewRay's invalidity contentions to address the new theories of
20 infringement presented by Varian. Varian has agreed that it would not oppose a
21 subsequent motion by ViewRay to amend its invalidity contentions to add contentions
22 with respect to the newly-asserted claims 1-4 of the '841 patent and to add one additional
23 reference as background material. However, Varian requested that ViewRay provide a
24 date certain by which it will serve its invalidity contentions.

25 ViewRay has been diligent in conducting the prior art searches required to
26 marshal its defenses on invalidity, and will be so diligent with respect to claims 1-4 of the
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1 '841 patent that Varian seeks to add to this litigation. However, due to the impact of
2 COVID-19, ViewRay is not able to provide Varian with a date certain by which new
3 prior art searches for claims 1–4 of the '841 patent can be completed, and therefore
4 cannot provide a date certain by which its amended invalidity contentions for claims 1–4
5 of the '841 patent, plus one additional background reference, can be served. Many of the
6 external sources that are not online are currently inaccessible due to government
7 restrictions, and the dates by which they will reopen to the public are constantly
8 changing.¹ ViewRay therefore will provide Varian with its amended invalidity
9 contentions for claims 1–4 of the '841 patent, plus one additional background reference,
10 30 days from the date that the prior art search results are received from its search team,
11 and ViewRay undertakes that its counsel will promptly inform Varian's counsel of the
12 dates that the searches were initiated and the search results are received.

13 For the above reasons, the parties respectfully request that the Court enter an
14 order: (1) granting Varian leave to amend its contentions; (2) deeming Varian's amended
15 contentions served on ViewRay as of the date of the Court's order; and (3) granting
16 ViewRay leave to amend its preliminary invalidity contentions to address claims 1-4 of
17 the '841 patent and add one background reference, as agreed to by the parties, and serve
18 the same no later than 30 days after it receives its prior art search results from its search
19 team.

20 Consistent with Civil Local Rule 5-1(i)(3), the filer of this document attests that
21 all signatories have concurred in its filing.

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25 ¹ For example, one focus of ViewRay's prior art searches will be on non-patent literature
26 from Japan, as much of the work in this field was done in Japan. Japan's National Diet
27 Library, which is a primary source of that prior art material, is currently closed to the
public. It was set to reopen on March 30, but that date has now been extended to
April 15. See <https://www.ndl.go.jp/en/>. It is unclear whether it will be further delayed.

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SO STIPULATED.

Dated: April 1, 2020

KEKER, VAN NEST & PETERS LLP

By: /s/ José L. Martinez

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VIEWRAY, INC., and VIEWRAY
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1 **~~PROPOSED~~ ORDER**

2 The Court, having reviewed the parties' stipulation and good cause appearing,
3 **GRANTS** the parties' Stipulation re Leave to Amend Contentions. Varian's proposed
4 amended infringement contentions are deemed served as of the date of this order, and
5 ViewRay's proposed amended invalidity contentions addressing claims 1-4 of the '841
6 patent and adding one background reference shall be served no later than 30 days from
7 the date that ViewRay receives the results of its prior art searches.

8 **IT IS SO ORDERED.**

9 Dated: April 2, 2020

10 
11 HON. SUSAN ILLSTON
12 United States District Judge