

EXHIBIT 11

**TO THE DECLARATION OF BRIAN J. NISBET
IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY ADJUDICATION**

Case: 17-1666 Document: 25 Page: 1 Filed: 08/01/2017

No. 2017-1666

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

NUVASIVE, INC.,
Appellant,

v.

JOSEPH MATAL, PERFORMING THE FUNCTIONS AND
DUTIES OF THE UNDER SECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND DIRECTOR
OF THE U.S. PATENT AND TRADEMARK OFFICE,
Intervenor.

Appeal from the United States Patent and Trademark Office,
Inter Partes Reexamination Control No. 95/001,888

NUVASIVE'S OPENING BRIEF

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August 1, 2017

U.S. Patent No. 7,691,057 Claim 17 (Appx1049-1050)

17. A method of accessing a surgical target site within a spine, comprising the steps of:

(a) creating a distraction corridor along a *lateral, trans-psoas path* to a targeted lumbar spinal disc in a lumbar spine using a distraction assembly comprising at least two dilators that are sequentially inserted along the *lateral, trans-psoas path* to the targeted lumbar spinal disc, and performing neuromonitoring during at least a portion of the time the distraction assembly is used in creating the distraction corridor along the *lateral, trans-psoas path*, wherein the neuromonitoring comprises causing the emission of a plurality of electrical stimulation signals from a stimulation electrode provided on a distal portion of at least one component of the distraction assembly and monitoring for resulting electromyographic (EMG) activity after the emission of each stimulation signal, and wherein the component of the distraction assembly is coupled to a control unit of a neuromonitoring system that is capable of displaying to a user an indication of at least one of proximity and direction of a nerve to the stimulation electrode provided on the component of the distraction assembly based on the monitored resulting electromyographic (EMG) activity;

(b) slidably advancing a plurality of retractor blades of a retraction assembly along an outermost dilator of the at least two dilators of the distraction assembly, the retraction assembly

comprising a handle assembly coupled to the plurality of retractor blades such that the retractor blades extend generally perpendicularly relative to arm portions of the handle assembly, each of said plurality of retractor blades having a generally concave inner face and a generally convex exterior face, said handle assembly being capable of moving said plurality of retractor blades from a closed position to an open position, said closed position being characterized by said plurality of retractor blades being positioned to abut one another and form a closed perimeter, said open position characterized by said plurality of retractor blades being positioned generally away from one another and forming an open perimeter;

(c) simultaneously introducing said plurality of retractor blades over the outermost dilator of said distraction assembly along the *lateral, trans-psoas path* to the targeted lumbar spinal disc while in said closed position;

(d) actuating said handle assembly to move said plurality of retractor blades to the open position so that the plurality of retractor blades create an operative corridor along the *lateral, trans-psoas path* to the targeted lumbar spinal disc;

(e) releasably engaging a fixation element with at least one of the plurality of retractor blades so that a distal portion of the fixation element extends distally from the at least one retractor blade and penetrates into a *lateral aspect of the lumbar spine*, wherein the fixation element secures the at least one retractor blade to the lumbar spine;

(f) inserting an implant through the operative corridor created by the plurality of retractor blades along the *lateral, trans-psoas path* to the targeted lumbar spinal disc.(emphasis added).

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