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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NUVASIVE, INC.,
Plaintiff,
v.
ALPHATEC HOLDINGS, INC. et al.,
Defendants.

Case No.: 3:18-CV-347-CAB-MDD
**ORDER RE NUVASIVE’S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**
[Doc. No. 250]

This is a patent infringement case in which NuVasive, Inc. (“NuVasive”) asserts that Alphatec Holdings, Inc. (“Alphatec”) infringes seven of NuVasive’s United States patents.¹ Discovery has concluded, and NuVasive now moves for summary adjudication of infringement of three of the asserted patents, U.S. Patent No. 8,439,832; U.S. Patent No. 8,355,780; and U.S. Patent 8,753,270.² Additionally, NuVasive moves for summary

¹ U.S. Patent No. 7,819,801; U.S. Patent No. 8,355,780; U.S. Patent No. 8,439,832; U.S. Patent No. 9,833,227; U.S. Patent No. 8,753,270; U.S. Patent No. 9,924,859; and U.S. Patent No. 9,974,531.
² At Doc. Nos. 1-8; 1-6; and 1-12, respectively.

1 adjudication of the validity of all seven of the asserted patents. Finally, NuVasive moves
2 for summary adjudication of Alphatec's inequitable conduct affirmative defense. [Doc.
3 No. 250.] Alphatec opposed. [Doc. No. 260.] NuVasive filed a reply. [Doc. No. 262.]
4 The Court held oral argument on March 13, 2020. Having considered the submissions of
5 the parties and the arguments of counsel, the motion is GRANTED IN PART and DENIED
6 IN PART.

7 The patents-at-issue generally claim a surgical access system including a tissue
8 distraction assembly and a tissue retraction assembly, both of which may be equipped with
9 one or more electrodes for use in detecting the existence of (and optimally the distance
10 and/or direction to) neural structures before, during, and after the establishment of an
11 operative corridor to a surgical target site.³ In particular, the systems are designed for use
12 in creating an operative corridor in a lateral, trans-psoas path to the lumbar spine.

13 NuVasive accuses Alphatec's Battalion Lateral Lumbar Spacer System ("Battalion
14 System") of infringing various claims of the patents at issue and moves for summary
15 judgment of infringement of claims 1, 3, 9 and 10 of the '832 patent, claims 21, 22, 24 and
16 27 of the '780 patent, and claims 1, 2, 3, 6 and 12 of the '270 patent.

17 I. Summary Judgment of Infringement

18 Pursuant of Fed. R. Civ. P. 56(a), summary judgment is appropriate when "there is
19 no genuine issue as to any material fact and the moving party is entitled to judgment as a
20 matter of law." To prove direct infringement a patentee must establish, by a preponderance
21 of the evidence, that one or more claims of the patent read on the accused device literally
22 or under the doctrine of equivalence. *See Adv. Cardiovascular Sys., Inc., v. Scimed Life*
23 *Sys., Inc.* 261 F.3d 1329, 1336 (Fed Cir. 2001). Summary judgment for the plaintiff on the
24 issue of infringement is proper when no reasonable jury could not find that every limitation
25 recited in a properly construed claim is found in the accused device either literally or under
26

27 _____
28 ³ See Abstract, '832 Patent; Abstract '780 Patent; Abstract '270 patent.

1 the doctrine of equivalents. *See PC Connector Solutions LLC v. Smartdisk Corp.*, 406 F.3d
2 1359, 1364 (Fed. Cir. 2005).

3 Determining whether a claim has been infringed requires a two-step analysis. First
4 the claim must be properly construed to determine its scope and meaning. Second, the
5 claim as properly construed must be compared to the accused device. *Id.* at 1362.

6 **A. The ‘832 Patent**

7 The ‘832 patent is for a “Surgical Access System and Related Methods.” The system
8 is designed to establish an operative corridor through or near any of a variety of tissues
9 having neural structures which, if contacted or impinged, may result in neural impairment
10 for the patient. [Doc. No. 1-8, at Col. 2:65- Col. 3:3.] A specific intended use of the system
11 of the ‘832 patent, as set forth in claim 1, is to create an operative corridor in a lateral,
12 trans-psoas path to the lumbar spine. NuVasive alleges Alphatec’s Battalion System
13 literally infringes the following claims.

14 Claim 1. A system for forming an operating corridor to a lumbar spine,
15 comprising:

16 a distraction assembly to create a tissue distraction corridor in a lateral, trans-
17 psoas path to a lumbar spine, wherein said distraction assembly includes an
18 elongate inner element and a plurality of dilators, the plurality of dilators
19 being configured to sequentially advance along the lateral, trans-psoas path to
20 the lumbar spine, the elongate inner element being positionable in a lumen of
21 an initial dilator of the plurality of dilators, wherein at least one instrument
22 from the group consisting of said elongate inner element and said dilators
23 includes a stimulation electrode that outputs electrical stimulation for nerve
24 monitoring when the at least one instrument is positioned in the psoas muscle;

25 a three-bladed retractor tool slidable over an exterior of an outermost
26 sequential dilator of the dilator system toward the targeted spinal disc along
27 the lateral, trans-psoas path, the three-bladed retractor assembly including:

28 a blade-holder assembly, and

a posterior-most retractor blade, a cephalad-most retractor blade, and a
caudal-most retractor blade that extend from the blade-holder assembly,
wherein the posterior-most, cephalad-most, and caudal-most retractor blades
are slidably advanced over the exterior of the outermost sequential dilator
while in a first position, wherein the blade-holder assembly is adjustable to

1 move the posterior-most, cephalad-most, and caudal-most retractor blades to
2 a second position in which the cephalad-most and caudal-most retractor
3 blades are spaced apart from the posterior-most retractor blade to define an
operative corridor,

4 wherein three-bladed retractor tool is configured to define the operative
5 corridor along the lateral, trans-psoas path to the lumbar spine in which a
6 space extending to the targeted spinal disc between the posterior-most,
7 cephalad-most, and caudal-most refractor [sic] blades is dimensioned so as to
pass an implant through the operative corridor along the lateral, trans-psoas
path to the lumbar spine.

8 Claim 3. The system of claim 1, wherein the elongate inner member is
9 advanced along the lateral, trans-psoas path to the targeted spinal discs such
10 that a distal tip portion of the elongate inner member penetrates into an
annulus of the targeted spinal disc.

11 Claim 9. The system of claim 1, further comprising a fourth retractor blade
12 that couples with the blade-holder assembly only after the blade-holder
13 assembly moves the posterior-most, cephalad-most and caudal-most retractor
blades to the second position.

14 Claim 10. The system of claim 1, further comprising a fixation element to
15 releasably engage with one of said retractor blades so that at least a portion of
16 the fixation element extends distally into the lumbar spine, wherein the
17 fixation element is configured to releasably engage with the posterior-most
18 retractor blade after the posterior-most retractor blade is advanced along the
lateral, trans-psoas path to the lumbar spine.

19 [Doc. No. 1-8 at Col. 14:31- Col.15:45.] NuVasive contends that all the elements of claims
20 1, 3, 9 and 10 of the '832 patent are present in the Battalion System.

21 Alphatec's Surgical Technique Guide describes the Battalion System as including:
22 (1) sequential dilators used to split and advance through the psoas muscle until flush to the
23 disc space; (2) the dilators having neuromonitoring capability; (3) a K-wire (i.e., an
24 elongate inner element) introduced through the dilators and inserted half-way into the
25 target disc; and (4) a three-blade retractor system introduced over the second dilator flush
26 with the disc space, the blades of which can be adjusted to define an operative corridor.

27 [Doc. No. 250-42.] The Squadron Retractor, as described in the surgical guide, includes
28

1 an intradiscal shim (i.e., fixation element) to stabilize the retractor and an optional fourth
2 blade.

3 **1. Distraction Assembly Limitation**

4 Alphatec contends that the Battalion System does not meet the limitations of claim
5 1 because it teaches a lateral, trans-psoas approach in which the surgeon is instructed to
6 first use blunt scissors and/or a finger to “dissect the subcutaneous tissue” to reach the
7 “retroperitoneal space” and then use a finger as a guide to insert an initial dilator to the
8 psoas muscle. [Doc. No. 250-42 at 5-7.] The initial dilator is then used to traverse the psoas
9 muscle to a position flush with the disc space. Alphatec argues that the “distraction
10 assembly” of the accused Battalion System therefore does not meet the distraction
11 assembly claim limitation as the system employs the use of scissors and/or the surgeon’s
12 finger to distract the tissues in the lateral path between the skin of the patient and the psoas
13 muscle, not just the use of sequential dilators.

14 To meet the limitations of claim 1, the distraction assembly must include sequential
15 dilators, an elongate element, and the retractor in accordance with the claim limitations.
16 “Includes” is the equivalent of “comprising” and is therefore not limiting. *See Lucent*
17 *Technologies, Inc. v. Gateway, Inc.*, 525 F.3d 1200, 1214 (Fed. Cir. 2008) (“including” and
18 “comprising” have the same meaning namely, that the listed elements are essential but
19 other elements may be added). The distraction assembly of claim 1 does not preclude the
20 addition of a scissor or finger to assist in the creation of the distraction corridor, provided
21 the distraction assembly also utilizes the elongate inner element and the plurality of
22 dilators. It is undisputed that the Battalion System includes the essential elements. It is
23 also undisputed that these elements of the accused system are capable of creating a
24 distraction corridor in a lateral, trans-psoas path to the patient’s spinal target, with or
25 without the addition of the scissors or a finger to dissect the subcutaneous tissue.
26 Accordingly, the Court finds that the Battalion System meets the distraction assembly
27 limitation.

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