

EXHIBIT A TO DECLARATION OF
WENDY L. DEVINE IN SUPPORT OF BENCH BRIEF
RE NEXUS AND XLIF

1 ATTORNEY WICKRAMASEKERA: I think we have copies of
2 the slides to give you so that you can see. I'll have my
3 colleague pass that up to you.

4 THE COURT: You know you only have 20 hours to put
5 your case on and that includes your opening statement. Okay.

6 ATTORNEY WICKRAMASEKERA: Your Honor, this is an
7 issue, I'm going direct your attention to one particular slide,
8 it permeates throughout the opening. I'm going to point your
9 attention to slide 28, and it should be "The Benefits of XLIF"
10 slide if we have the same numbering.

11 THE COURT: Yes.

12 ATTORNEY WICKRAMASEKERA: Okay. There's also a few
13 slides before that that show neuromonitoring and
14 neuromonitoring system. NuVasive's neuromonitoring system is
15 called Neurovision. And the benefits of XLIF that NuVasive is
16 essentially presenting in its opening as if XLIF is the claimed
17 invention so that for purposes of invalidity, we should be
18 thinking about XLIF and skepticism of XLIF, and that's wrong
19 under the law, and so we think that that's highly misleading to
20 the jury and it's wrong.

21 And I'll read, Your Honor, from -- so the key issue
22 here, Your Honor, I don't think there is any dispute from the
23 other side that Neurovision, the Neurovision system
24 neuromonitoring system is not required in the claims. When
25 Your Honor issued her summary judgment order against Alphatec

1 for the '832 patent, no neuromonitoring was accused. They
2 never proved anything with respect to neuromonitoring. They've
3 never accused any neuromonitoring. However, what they are
4 trying to do in this case is make XLIF be the issue for
5 invalidity. So they're pointing to skepticism of XLIF in their
6 slides. They're presenting slide after slide after slide on
7 the benefits that flow from the Neurovision component of XLIF.

8 And I just want to read for Your Honor from Teva v Eli
9 Lilly. This is a 2021 case from the Federal Circuit. And the
10 Federal Circuit says that as to unclaimed features and whether
11 those are relevant for secondary considerations, the Court said
12 "we have never held that the existence -- the existence of one
13 or more unclaimed features standing alone means nexus may not
14 be present."

15 Okay. The Court went on to say "however, if the
16 unclaimed features amount to nothing more than additional
17 insignificant features presuming nexus may nevertheless be
18 appropriate."

19 That's not the situation we have here. What we have
20 here is what the Federal Circuit said is not okay for nexus.
21 The Federal Circuit says "toward the other end of the spectrum,
22 we have said that a patent claim is not coextensive with a
23 product that includes a critical unclaimed feature that is
24 claimed by a different patent and that materially impacts the
25 product's functionality."

1 They have patents to Neurovision. Neurovision is
2 required for XLIF. It is the very thing that they tell as
3 being what resulted in the safety of the XLIF.

4 This case is not about XLIF. This case about the
5 claims of their asserted patents. The claims of their asserted
6 patents are not the same as XLIF. And so we think it's
7 misleading to the jury. We think there should be no dispute
8 that the Neurovision and that XLIF is not the same as the
9 claimed invention because we don't have it. They never accused
10 us of having it. They didn't get a summary judgment order from
11 Your Honor on the basis of proving that we had neuromonitoring
12 and that we had their neuromonitoring. So that's the issue
13 that we have.

14 We think that commercial success, skepticism, all of
15 that must be tied to what the Federal Circuit said is a product
16 that is the invention must coextensive. If it has unclaimed
17 features that are critical, it's not coextensive. That's the
18 issue we have with this presentation. With that, I think if
19 Your Honor has any question for me?

20 THE COURT: Well, I understand fundamentally your
21 argument, and we discussed this in the summary judgment that
22 the neuromonitoring aspect of the claimed apparatus is that it
23 does have the capability for neuromonitoring, but that it
24 didn't have to incorporate neuromonitoring in the apparatus
25 claim, just the ability to do that. That's all fine.

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