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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NUVASIVE, INC.,
Plaintiff,
v.
ALPHATEC HOLDINGS, INC., ET
AL.,
Defendant.

Case No.: 18-cv-0347-CAB-MDD

**ORDER ON JOINT MOTON FOR
DETERMINATION OF
DISCOVERY DISPUTE**

[ECF NO. 60]

Before the Court is the Joint Motion of the parties for determination of a discovery dispute filed on June 4, 2018. (ECF No. 60). This is a patent case and the joint motion presents Plaintiff’s motion to compel further responses to two interrogatories and eleven requests for production of documents.

Legal Standard

The Federal Rules of Civil Procedure authorize parties to obtain discovery of “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case” Fed. R. Civ. P. 26(b)(1). “Information within the scope of discovery need not be admissible in evidence to be discoverable.” *Id.* District courts have broad discretion to

1 limit discovery where the discovery sought is “unreasonably cumulative or
2 duplicative, or can be obtained from some other source that is more
3 convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C).

4 An interrogatory may relate to any matter that may be inquired of
5 under Rule 26(b). Fed. R. Civ. P. 33(a)(2). The responding party must
6 answer each interrogatory by stating the appropriate objection(s) with
7 specificity or, to the extent the interrogatory is not objected to, by
8 “answer[ing] separately and fully in writing under oath.” Rule 33(b). The
9 responding party has the option in certain circumstances to answer an
10 interrogatory by specifying responsive records and making those records
11 available to the interrogating party. Rule 33(d).

12 Similarly, a party may request the production of any document within
13 the scope of Rule 26(b). Fed. R. Civ. P. 34(a). “For each item or category, the
14 response must either state that inspection and related activities will be
15 permitted as requested or state an objection to the request, including the
16 reasons.” Rule 34(b)(2)(B). If the responding party chooses to produce
17 responsive information, rather than allow for inspection, the production must
18 be completed no later than the time specified in the request or another
19 reasonable time specified in the response. *Id.* An objection must state
20 whether any responsive materials are being withheld on the basis of that
21 objection. Rule 34(b)(2)(C). An objection to part of a request must specify the
22 part and permit inspection or production of the rest. *Id.* The responding
23 party is responsible for all items in “the responding party’s possession,
24 custody, or control.” Rule 34(a)(1). Actual possession, custody or control is
25 not required. Rather, “[a] party may be ordered to produce a document in the
26 possession of a non-party entity if that party has a legal right to obtain the
27 document or has control over the entity who is in possession of the

1 document.” *Soto v. City of Concord*, 162 F.R.D. 603, 620 (N.D. Cal. 1995).

2 **Discussion**

3 A. Interrogatories

4 Interrogatory No. 4

5 Plaintiff requests that Defendants identify each person or entity hired,
6 contracted with, attempted to hire, or attempted to contract with in
7 connection with the development, manufacture, marketing or sale of the
8 accused products. Defendants’ first objection is that this is a compound
9 interrogatory. The Court disagrees. This objection is overruled. Defendants’
10 relevance objection, however, appears well-founded. Plaintiff asserts that
11 this information is relevant to Defendants’ decisions regarding the ultimate
12 design and operation of the accused products and its intentions regarding the
13 scope of its sales of the products. Also, Plaintiff asserts that this information
14 is relevant to the issue of willful infringement. The Court disagrees.
15 Defendants’ objection for relevance is SUSTAINED.

16 Interrogatory No. 5

17 Plaintiff requests that Defendants describe in detail all of its actions to
18 “complete [its] lateral solution.” Plaintiff asserts that Defendants’ “lateral
19 solution” is to copycat Plaintiff’s products and capitalize on the goodwill of
20 former employees of Plaintiff. Defendants object and assert that there is no
21 allegation that the products that may be part of the lateral solution involve
22 any accused products or technology. The Court agrees that Plaintiff has not
23 alleged that the lateral solution encompasses the accused products.
24 Defendants’ objection for relevance is SUSTAINED.

25 B. Requests for Production (“RFP”)

26 RFP Nos. 7-8 and 25

27 There is no dispute presented other than the timing of the production of

1 responsive documents by Defendants. Rule 34(b)(2)(A), Fed. R. Civ. P.,
2 requires the responding party to respond to an RFP within 30 days of being
3 served. Rule 34(b)(2)(B) requires the responding party to produce responsive
4 documents within the time specified in the request “or another reasonable
5 time specified in the response.” Here, Defendants’ response is deficient.
6 Although they have agreed to produce responsive documents, they have not
7 specified a reasonable time within which production will be made and
8 completed. This deficiency must be remedied.

9 RFP No. 28

10 The dispute here relates to a portion of the RFP. Defendants object to
11 the portion of the RFP that requires production of documents concerning
12 Defendants’ decision to hire or contract with personnel of Plaintiff involved in
13 the development, manufacture or sale of XLIF. As with Interrogatory No. 4,
14 Defendants’ objection for relevance to this portion of the RFP is
15 SUSTAINED. But, as with RFPs Nos. 7-8 and 25, Defendants must provide
16 a reasonable date by which otherwise responsive documents will be produced.

17 RFP No. 34

18 Plaintiff requests all documents regarding Defendants’ communications
19 with Patrick Miles prior to his employment with Defendants. Mr. Miles
20 allegedly is an inventor of certain of the accused products. Defendants have
21 offered to produce all communications with Mr. Miles regarding the accused
22 products prior to his employment. Plaintiff wants all communications.
23 Defendants offer is reasonable. Plaintiff has not convinced the Court that all
24 communications with Mr. Miles are relevant. Defendants’ objection is
25 SUSTAINED IN PART – Defendants, as offered, must produce all
26 communications with Mr. Miles prior to his employment that concern the
27 accused products.

1 RFP Nos. 35-38

2 These RFPs request the production of all documents regarding
3 communications with certain former employees of Plaintiff (RFP 35),
4 surgeons (RFP 36), distributors or sales representatives (RFP 37), and
5 surgeons who perform XLIF, any current employee of Plaintiff and any
6 current or former distributor of XLIF (RFP 38). Defendants object for
7 relevance. As with Interrogatory No. 4 and RFP No., 28, the Court is not
8 convinced that this information is relevant. Defendants' objection for
9 relevance is SUSTAINED.

10 RFP No. 39

11 Plaintiff requests all documents regarding Defendants' decision to
12 acquire neuromonitoring technology, instruments and/or capabilities. There
13 is no connection to any claim of patent infringement. Defendants' objections
14 for relevance and overbreadth are SUSTAINED.

15 RFP No. 40

16 Plaintiff requests all documents concerning Defendants'
17 communications with SafeOp Surgical, Inc. There is no connection to any
18 claim of patent infringement. Defendants' objections for relevance and
19 overbreadth are SUSTAINED.

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