IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ACANTHA LLC, Plaintiff, v. NuVasive, Inc., Defendant.	)	Civil Action No. 19-CV-10656 JURY TRIAL DEMANDED

COMPLAINT

Plaintiff, Acantha LLC (hereinafter "Plaintiff" or "Acantha"), files this Complaint against NuVasive, Inc. (hereinafter "NuVasive" or "Defendant") for patent infringement under 35 U.S.C. § 271 and alleges, based on its own personal knowledge with respect to its own actions and based upon information and belief with respect to all others' actions, as follows:

THE PARTIES

1. Plaintiff, Acantha LLC, is a limited liability corporation organized and existing under the laws of the State of Delaware with its members residing in California, Illinois, and Wisconsin.

2. Defendant, NuVasive, Inc., is a corporation organized and existing under the laws of Delaware, with an office location at 3891 Ranchero Drive, Ann Arbor, MI 48108. NuVasive, Inc. has designated Cogency Global Inc. at 229 Brookwood Dr, Suite 14, South Lyon, MI 48178 as its agent for service of process.

JURISDICTION AND VENUE

3. This is an action for patent infringement arising under the patent laws of the United States, 35 U.S.C. §§ 1 *et seq*. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

4. This Court has personal jurisdiction over Defendant. Defendant conducts business, has committed acts of patent infringement or has induced acts of patent infringement by others in this district, and has an office in this District.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1400(b) because certain of the acts complained of herein occurred in this judicial district and Defendant has a regular and established place of business in this district.

PATENTS-IN-SUIT

6. On July 17, 2001, the United States Patent and Trademark Office duly and legally issued U.S. Patent No. 6,261,291 (the "'291 patent"), entitled "Orthopedic Implant Assembly." A true and correct copy of the '291 patent is attached hereto as Exhibit A.

7. The '291 patent was later reissued as U.S. Patent No. RE43,008 (the "'008 patent" or the "patent-in-suit"), which was duly and legally issued by the United States Patent and Trademark Office on December 6, 2011. A true and correct copy of the '008 patent is attached hereto as Exhibit B.

8. Pursuant to 35 U.S.C. § 282, the '008 patent is presumed valid.

9. Acantha LLC owns all rights, title, and interest in and to the '008 patent and possesses all rights of recovery.

10. The patent-in-suit generally covers an orthopedic implant assembly, for which the primary use is joining bone segments, that durably and securely attaches to the bone including through the use of one-step biased stopping members, and methods of use thereof.

FACTUAL ALLEGATIONS

NuVasive's Awareness of the Patent-in-Suit.

11. Shortly after the '291 patent issued, Acantha entered an exclusive license agreement with Stryker Corporation for the patent-in-suit, covering Stryker's Reflex product and its progeny.

12. Acantha complied with 35 U.S.C. § 287's constructive notice requirement with respect to the licensed Stryker products because the parties' license agreement obligated Stryker to mark the relevant products with Acantha's patent number; because Acantha has made reasonable efforts to ensure Stryker's marking; and because Stryker did so mark.

13. In April of 2013 Acantha and Stryker amended their agreement, and the license agreement became non-exclusive, allowing Acantha to provide licenses to companies other than Stryker.

14. Shortly thereafter, Patrick Miles, then an executive at Defendant, contacted Acantha inventor David Talaber and expressed interest in the '008 patent.

15. Defendant did not take a license to the '008 patent or otherwise receive Acantha's permission to use its patented technology.

16. Acantha's patent has been cited during prosecution of several of Defendant's own patents. *See, e.g.*, U.S. Patent Nos. 7,887,595; 8,328,856; 9,060,813; 8,114,162; 8,940,030; 9,387,013; D708,747; D734,853.

17. Acantha got back in touch with Defendant in 2018 and offered to license Defendants' infringement of the '008 patent, but NuVasive would not even allow Acantha's members to meet with NuVasive's business decisionmakers to discuss a resolution, and no license agreement was reached.

NuVasive's Infringing Products.

18. Defendant does not have any rights to the '008 patent or to the '291 patent.

19. Defendant is in the business of, among other things, designing, developing, manufacturing, using, selling and/or importing medical devices.

20. Several of Defendant's implant systems employ one-step, biased stopping members covered by the patent-in-suit, in the form of a "canted-coil lock" or "nitinol spring lock" blocking mechanism.

21. The NuVasive Helix Anterior Cervical Plate ("ACP") family of systems (NuVasive Helix ACP, NuVasive Helix Mini ACP, NuVasive Helix-T ACP, and NuVasive Helix-Revolution ACP) is a family of implants and instruments designed for anterior stabilization of the cervical spine. These implants feature a one-step, canted-coil blocking mechanism and variable angle screws.

22. The first Helix system received FDA approval in August 2007, and Defendant has made, used, offered to sell, sold, or imported the Helix ACP systems, or induced or contributed to this conduct, since 2007.

23. The Halo Anterior Lumbar Plate System is a family of implants and instruments designed for anterior stabilization of the lumbar spine. This family features a one-step, canted-coil blocking mechanism.

24. The Halo system received FDA approval in October 2007, and Defendant has made, used, offered to sell, sold, or imported the Halo, or induced or contributed to this conduct, since 2007.

25. The Traverse Plate System is a family of implants and instruments designed for anterior thoracolumbar reconstruction and fixation. This family features a one-step canted-coil blocking mechanism.

26. The Traverse Plate System received FDA approval in March 2011, and Defendant has made, used, offered to sell, sold, or imported the Traverse, or induced or contributed to this conduct, since 2011.

27. The Brigade Anterior Plate System is a family of implants and instruments designed for anterior/anterolateral thoracolumbar stabilization. This system features a one-step, biased blocking mechanism (a nitinol spring lock) and variable angle screws.

28. The Brigade Anterior Plate System received FDA approval in July 2012, and Defendant has made, used, offered to sell, sold, or imported the Brigade, or induced or contributed to this conduct, since 2012.

29. The CoRoent XL-F is an interbody implant system with integrated, self-locking screws, for use in an XLIF procedure for lateral approach spine surgery. The implant uses two screws and employs a one-step, canted-coil blocking mechanism.

30. The first CoRoent XL-F implant received FDA approval in July 2014, and Defendant has made, used, offered to sell, sold, or imported the CoRoent XL-F, or induced or contributed to this conduct, since 2014.

31. NuVasive sells other products that employ the one-step canted-coil blocking mechanism described above, or the one-step nitinol spring lock blocking mechanism described above.

32. Defendant has committed and continues to commit acts of infringement under 35 U.S.C. § 271 with any version of its Helix, Halo, Traverse, Brigade, and CoRoent XL-F

systems of implants, along with other implant systems that have a one-step blocking mechanism assembly that is not colorably different than the aforementioned products (collectively referred to as the "Accused Instrumentalities"). In committing these acts of infringement, Defendant acted despite an objectively high likelihood that its actions constituted infringement of a valid patent, and Defendant knew or should have known that its actions constituted an unjustifiably high risk of infringement of a valid and enforceable patent.

COUNT ONE: PATENT INFRINGEMENT

33. Plaintiff incorporates by reference the preceding paragraphs as though fully set forth herein.

34. As described below, Defendant has infringed and continues to infringe at least one claim the patent-in-suit.

35. The Accused Instrumentalities meet at least one claim of the patent-in-suit, as described in more detail for exemplary claim 59 in the attached Exhibit C.

36. Defendant makes, uses, offers to sell, sells and/or imports the Accused Instrumentalities within the United States or into the United States without authority from Plaintiff.

37. Defendant therefore infringes the patent-in-suit under 35 U.S.C. § 271(a).

38. Defendant has actual knowledge of the patent-in-suit.

39. Defendant indirectly infringes the patent-in-suit by inducing infringement by others such as distributors, hospitals, and surgeons by, for example, encouraging distributors to advertise and sell the Accused Instrumentalities to hospitals and surgeons within the United States, instructing and encouraging hospitals and surgeons to purchase and use the Accused Instrumentalities in the United States, and instructing surgeons how to use the Accused

Instrumentalities in the United States. For example, Defendant offers instruction via its promotional materials, its website, and surgical technique guides.

40. Defendant took the above actions intending to cause infringing acts by others.

41. Defendant was aware of the patent-in-suit and knew that the others' actions, if taken, would constitute infringement of the '008 patent. Alternatively, Defendant believed there was a high probability that others would infringe the patent-in-suit but remained willfully blind to the infringing nature of others' actions.

42. Defendant therefore infringes the patent-in-suit under 35 U.S.C. § 271(b).

43. Defendant indirectly infringes the patent-in-suit by contributing to infringement by others, such as distributors, hospitals, and surgeons, by offering to sell and/or selling within the United States components that constitute a material part of the inventions claimed in the patent-in-suit, or components that are used to practice one or more processes/methods covered by the claims of the patent-in-suit. Such components are, for example, each of the various instruments sold for use with each of the Accused Instrumentalities, or the various component parts of the Accused Instrumentalities.

44. In the above offering to sell and/or selling, Defendant knows that these components are especially made or especially adapted for use in an infringement of the patent-in-suit and that these components are not a staple article or commodity of commerce suitable for substantial non-infringing use, or at least knows there is a high probability of the same and remains willfully blind to it.

45. Defendant therefore infringes the patent-in-suit under 35 U.S.C. § 271(c).

46. Defendant's acts of infringement have caused damage to Plaintiff. Plaintiff is entitled to recover from Defendant the damages sustained by Plaintiff as a result of Defendant's wrongful acts in an amount subject to proof at trial.

47. Defendant has committed and continues to commit acts of infringement under 35 U.S.C. § 271 with the Accused Instrumentalities. In committing these acts of infringement, Defendant has acted despite an objectively high likelihood that its actions constituted infringement of a valid patent, and Defendant actually knew or should have known that its actions constituted an unjustifiably high risk of infringement of a valid and enforceable patent.

48. Defendant's infringement of the patent-in-suit has been and continues to be willful.

49. Defendant's willful infringement of the patent-in-suit and disregard for Acantha's attempts to reach a licensing arrangement with it has constituted egregious misconduct beyond typical infringement.

50. At least this willful infringement has made the present case exceptional pursuant to 35 U.S.C. § 285 and/or other applicable authority. Therefore, Acantha is entitled to its attorneys' fees upon prevailing in this action.

51. To the extent that Defendant releases or has released any new version of the Accused Instrumentalities, such instrumentalities will meet the claims of the patent-in-suit and infringe the patent-in-suit under 35 U.S.C. §§ 271(a)–(c) in ways analogous to Defendant's current infringement described above.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury for all issues so triable.

PRAYER FOR RELIEF

1. A judgment that Defendant has directly infringed the patent-in-suit, contributorily infringed the patent-in-suit, and/or induced the infringement of the patent-in-suit;

2. A judgment that Defendant's infringement of the patent-in-suit has been willful;

3. A ruling that this case is exceptional under 35 U.S.C. § 285, and a judgment awarding to Plaintiff its attorneys' fees incurred in prosecuting this action;

4. A judgment and order requiring Defendant to pay Plaintiff damages under 35 U.S.C. § 284 for infringement up until expiration of the patent-in-suit, and enhanced damages for willful infringement as provided by 35 U.S.C. § 284;

5. A judgment and order requiring Defendant to pay Plaintiff the costs of this action (including all disbursements);

6. A judgment and order requiring Defendant to pay Plaintiff pre-judgment and post-judgment interest on the damages award;

7. In the event the judgment described above does not account for all infringing sales through the expiration of the patent-in-suit, a judgment and order awarding Plaintiff a compulsory ongoing licensing fee; and

8. Such other and further relief as the Court may deem just and proper.

Dated: March 5, 2019

Respectfully submitted,

YOUNG & ASSOCIATES

/s/Rodger D. Young

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