IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NUVASIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.
	)	
NEUROVISION MEDICAL PRODUCTS, INC.,	)	JURY TRIAL DEMANDED
	)	
	)	
Defendant	)	

NUVASIVE, INC.'S COMPLAINT FOR DECLARATORY JUDGMENT OF PATENT NON-INFRINGEMENT AND INVALIDITY

Plaintiff, NuVasive, Inc. ("Plaintiff" or "NuVasive"), by and through its undersigned counsel, submits its Complaint for Patent Non-Infringement and Invalidity against Defendant, Neurovision Medical Products, Inc. ("Defendant" or "NMP") (the "Complaint").

1. NuVasive seeks a declaration from this Court that (1) it does not infringe U.S. Patent Nos. 8,467,844 (the "'844 Patent") and 8,634,894 (the "'894 Patent") (together, the "Patents-in-Suit"); and (2) the Patents-in-Suit and/or certain claims in the Patents-in-Suit are invalid and/or unenforceable.

THE PARTIES

2. NuVasive is a Delaware corporation with its principal place of business at 7475 Lusk Boulevard, San Diego, California 92121.

3. On information and belief, NMP is a Missouri corporation with its principal place of business at 2225 Sperry Avenue, Suite 1000, Ventura, California 93003.

JURISDICTION AND VENUE

4. NuVasive alleges that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338 with respect to claims arising under the patent laws,

35 U.S.C. §§ 101 *et seq.*, and pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*

5. NuVasive alleges that this Court has personal jurisdiction over NMP because NMP has done and continues to do business in the State of Delaware and in this District.

6. NuVasive alleges that venue is proper in this District under 28 U.S.C. §§ 1391 and 1400.

FACTUAL BACKGROUND

7. On June 6, 2013, NMP filed a complaint in Superior Court for the State of California alleging that NuVasive misappropriated certain purported trade secrets of NMP (the "Trade Secret Action"). In the course of the Trade Secret Action, NMP alleged that the claims of the Patents-in-Suit comprise its purported trade secrets. Moreover, NMP asked NuVasive to admit in discovery that NuVasive infringes the Patents-in-Suit. On March 17, 2015, the California court stayed the Trade Secret Action.

8. NuVasive alleges that NMP has no protectable trade secrets, the Patents-in-Suit are invalid, and that NuVasive has not and does not infringe any valid and enforceable claim of the Patents-in-Suit.

9. Accordingly, there is an actual case or controversy between NuVasive and NMP over non-infringement, invalidity, and unenforceability of the Patents in Suit.

COUNT I
NONINFRINGEMENT OF THE '844 PATENT

10. NuVasive restates and incorporates by references the Paragraphs above as if set forth in full here.

11. As a result of NMP's allegations and the admissions NMP sought in the Trade Secret Action, NuVasive has a reasonable apprehension that NMP is contemplating suing

NuVasive for alleged infringement of the ’844 Patent. NuVasive does not believe that it has infringed or is infringing any valid and enforceable claim of the ’844 Patent.

12. Because of NMP’s allegations in the Trade Secret Action and the admissions it sought from NuVasive in the Trade Secret Action, an actual case or controversy exists between NMP and NuVasive as to whether or not NuVasive has infringed or is infringing the ’844 Patent.

13. NuVasive, therefore, seeks a judicial declaration that it has not infringed and does not infringe the ’844 Patent.

COUNT II
INVALIDITY OF THE ’844 PATENT

14. NuVasive restates and incorporates by reference the Paragraphs above as if set forth in full here.

15. NuVasive is informed and believes and on that basis alleges that the ’844 Patent is invalid for failure to meet the conditions of patentability and/or otherwise comply with one or more of the provisions of 35 U.S.C. §§ 101 *et seq.*, including but not limited to §§ 101, 102, 103, and/or 112. In particular, but without limitation, claims of the ’844 Patent lack adequate written description, are indefinite, and/or there is insufficient disclosure to support the full breadth of the claims such that practicing the claimed inventions would require undue experimentation. The independent claims of the ’844 Patent all require a second electrode in contact with the tongue but the provisional patent application to which the ’844 Patent claims priority does not mention a tongue electrode. Moreover, the ’844 Patent lacks adequate support for the claim term “without inclusion of a carrier film,” and there are printed publications and/or prior-art products (for example a product sold by ECOM beginning in or about 2007 and a product sold by Xomed beginning in the early 1990s) that render the ’844 Patent not novel or obvious.

16. Because of NMP's allegations in the Trade Secret Action and the admissions it sought from NuVasive in the Trade Secret Action, an actual case or controversy exists between NMP and NuVasive as to the invalidity and/or enforceability of the '844 Patent.

17. NuVasive, therefore, seeks a judicial declaration that the '844 Patent is invalid and/or unenforceable.

COUNT III
NONINFRINGEMENT OF THE '894 PATENT

18. NuVasive restates and incorporates by reference the Paragraphs above as if set forth in full here.

19. As a result of NMP's allegations and the admissions NMP sought in the Trade Secret Action, NuVasive has a reasonable apprehension that NMP is contemplating suing NuVasive for allegedly infringing the '894 Patent. NuVasive does not believe that it has infringed or is infringing any valid and enforceable claim of the '894 Patent.

20. Because of NMP's allegations in the Trade Secret Action and the admissions it sought from NuVasive in the Trade Secret Action, an actual case or controversy exists between NMP and NuVasive as to whether or not NuVasive has infringed or is infringing the '894 Patent.

21. NuVasive, therefore, seeks a judicial declaration that it has not infringed and does not infringe the '894 Patent.

COUNT IV
INVALIDITY OF THE '894 PATENT

22. NuVasive restates and incorporates by reference the Paragraphs above as if set forth in full here.

23. NuVasive is informed and believes and on that basis alleges that the '894 Patent is invalid for failure to meet the conditions of patentability and/or otherwise comply with one or

more of the provisions of 35 U.S.C. §§ 101 *et seq.*, including but not limited to §§ 101, 102, 103, and/or 112. In particular, but without limitation, claims of the '894 Patent lack adequate written description, are indefinite, and/or there is insufficient disclosure to support the full breadth of the claims such that practicing the claimed inventions would require undue experimentation. Some independent claims of the '894 Patent require a second electrode "positioned to contact tissue, nerves, and muscle in the trachea or the tongue," which if not an anatomic impossibility is nonsensical in the context of the claimed invention. Further, the provisional patent application to which the '894 Patent claims priority does not mention a second electrode "positioned to contact tissue, nerves, and muscle in the trachea or the tongue." Moreover, the '894 Patent lacks adequate support for the claim term "without inclusion of a carrier film," and there are printed publications and/or prior-art products (for example a product sold by ECOM beginning in or about 2007 and a product sold by Xomed beginning in the early 1990s) that render claims of the '894 Patent obvious or not novel.

24. Because of NMP's allegations in the Trade Secret Action and the admissions it sought from NuVasive in the Trade Secret Action, an actual case or controversy exists between NMP and NuVasive as to the invalidity and/or enforceability of the '844 Patent.

25. NuVasive, therefore, seeks a judicial declaration that the '844 Patent is invalid and/or unenforceable.

PRAYER FOR RELIEF

A. A declaration that NuVasive has not infringed and does not infringe any valid or enforceable claim of the Patents in Suit.

B. A declaration that the Patents in Suit are invalid and/or unenforceable.

C. A declaration enjoining NMP, its agents, servants, employees, and/or attorneys from initiating or continuing infringement litigation, from otherwise participating or assisting in infringement litigation, and from threating NuVasive, or any of its customers, dealers, agents, servants, or employees with infringement litigation, or charging any of them either verbally or in writing with infringement of the Patents in Suit.

D. A judgment against NMP and in favor of NuVasive on this Complaint.

E. Should the case be deemed exceptional, an award to NuVasive of its reasonable expenses of litigation, including attorneys' fees and expert witness fees.

F. A judgment limiting or barring NMP's ability to enforce the Patents in Suit.

G. An award of costs as the prevailing party.

H. Any further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

NuVasive respectfully requests a trial by jury on all issues so triable.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Thomas C. Grimm

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