

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUDSON SURGICAL DESIGN, INC.,

Plaintiff,

v.

SMITH & NEPHEW, INC.,

Defendant.

Case No. 2:11-cv-01371-JLR

FIRST AMENDED COMPLAINT
FOR PATENT INFRINGEMENT

JURY TRIAL DEMANDED

Plaintiff, Hudson Surgical Design, Inc. ("Hudson") submits this first amended complaint against defendant Smith & Nephew, Inc. ("S&N") as follows:

THE PARTIES

1. Hudson is a Washington corporation having its place of business at 3629B Evanston Avenue North, Seattle, Washington 98103.
2. S&N is a Delaware corporation having a place of business at 1450 Brooks Road, Memphis, Tennessee 38116.

JURISDICTION AND VENUE

3. This is a complaint for patent infringement under the patent laws of the United States, Title 35 of the United States Code. This Court has original jurisdiction over the subject matter of this complaint under 28 U.S.C. § 1338(a). Venue in this district is proper under 28 U.S.C. §§ 1400(b) and 1391(c).

PATENT INFRINGEMENT

4. Hudson owns all right, title and interest in, has the sole and exclusive right to enforce, and has standing to sue and recover damages for, infringement of U.S. Patent No. 7,967,822, entitled “Methods and Apparatus for Orthopedic Implants” (“the ’822 patent”). A copy of the ’822 patent is attached as Exhibit 1.

5. The ’822 patent was issued by the United States Patent and Trademark Office on June 8, 2011.

6. Hudson also owns all right, title and interest in, has the sole and exclusive right to enforce, and has standing to sue and recover damages for, infringement of U.S. Patent No. 8,021,368, entitled “Methods and Apparatus for Improved Cutting Tools for Resection” (“the ’368 patent”). A copy of the ’368 patent is attached as Exhibit 2.

7. The ’368 patent was issued by the United States Patent and Trademark Office on September 20, 2011.

Infringement of the ’822 Patent

8. S&N has designed, made, marketed, provided, distributed, offered for sale, sold and otherwise promoted and encouraged the use of instruments for use in minimally invasive total knee arthroplasty including tibial cutting blocks for its Profix, Genesis II, Legion and Journey BCS total knee systems. These include at least the following S&N product numbers: 7151-3322; 7151-3323; 7151-3324; 7151-3325; 7151-3326; 7151-3327; 7144-1136; 7144-1137; 7401-7411; 7401-8411; and Visionaire Patient Matched tibial cutting blocks. These are collectively referred to as the “S&N TKA tibial instruments.”

9. S&N has designed, made, marketed, provided, distributed and otherwise promoted and encouraged the use of surgical techniques for minimally invasive total knee arthroplasty using the S&N TKA tibial instruments including, but not limited to, the following surgical techniques: “Minimally Invasive TKA Profix Distal Cut First”; “Genesis II Anterior Cut First”; “Extramedullary Tibial Preparation”; and “Visionaire Patient Matched Surgical

1 Procedure.” These surgical techniques are collectively referred to as the “S&N TKA surgical
2 techniques.”

3 8. The S&N TKA tibial instruments were designed, made and adapted, and have
4 been marketed, promoted, provided, distributed, offered for sale and sold, for use in performing
5 the S&N TKA surgical techniques and are not staple articles or commodities of commerce
6 suitable for substantial non-infringing use.

7 9. The S&N TKA surgical techniques were designed, made and adapted, and have
8 been marketed, promoted, provided and distributed, for use with the S&N TKA tibial
9 instruments and are not staple articles or commodities of commerce suitable for substantial
10 non-infringing use.

11 10. S&N has designed, made, marketed, provided, distributed and otherwise
12 promoted and encouraged the use of implants for implantation using the S&N TKA tibial
13 instruments and the S&N TKA surgical techniques. These implants are collectively referred to
14 as the “S&N implants.”

15 11. S&N has been aware of Hudson’s patent rights in the field of MIS TKA for
16 many years. S&N has been aware of the ’822 patent and its direct application to the S&N TKA
17 tibial instruments, the S&N TKA surgical techniques and the S&N implants since June 28,
18 2011. S&N has acted with at least willful blindness with respect to Hudson’s patent rights.

19 12. S&N has directly infringed at least claims 2, 4, 10, 13, 15, 23, 25, 26 and 27 of
20 the ’822 patent by, among other activities, making, using, offering to sell, selling, importing,
21 exporting, providing and distributing S&N TKA tibial instruments, S&N TKA surgical
22 techniques and S&N implants to hospitals, surgeons and others throughout the United States,
23 including in this judicial district.

24 13. S&N has actively induced hospitals, surgeons, distributors, sales representatives,
25 sales agents and others to infringe at least claims 1, 3, 10, 13, 14, 23, 25, 26 and 27 of the ’822
26 patent under 35 U.S.C. § 271(b) by, among other activities, designing and making S&N TKA
27 tibial instruments, S&N TKA surgical techniques and S&N implants; by offering for sale,

1 selling, importing, exporting, providing and distributing these instruments, techniques and
2 implants to hospitals, surgeons, distributors, sales representatives, sales agents and others
3 throughout the United States, including in this judicial district; and by aiding, assisting and
4 encouraging hospitals, surgeons, distributors, sales representatives, sales agents and others to
5 practice the steps of these claims throughout the United States, including in this judicial district.

6 14. S&N has contributed to the infringement of at least claims 1, 3, 10, 13, 14, 23,
7 25, 26 and 27 of the '822 patent by hospitals, surgeons, distributors, sales representatives, sales
8 agents and others under 35 U.S.C. § 271(c) by, among other activities, designing and making
9 S&N TKA tibial instruments, S&N TKA surgical techniques and S&N implants; by offering
10 for sale, selling, importing, exporting, providing and distributing these instruments, techniques
11 and implants to hospitals, surgeons, distributors, sales representatives, sales agents and others
12 throughout the United States, including in this judicial district; and by encouraging hospitals,
13 surgeons, distributors, sales representatives, sales agents and others to practice the steps of
14 these claims throughout the United States, including in this judicial district.

15 15. S&N has actively induced hospitals, surgeons and others to infringe at least
16 claims 2, 4, 10, 13, 15, 23, 25, 26 and 27 of the '822 patent under 35 U.S.C. § 271(b) by,
17 among other activities, designing and making S&N TKA tibial instruments, S&N TKA surgical
18 techniques and S&N implants; by offering for sale, selling, importing, exporting, providing and
19 distributing these instruments, techniques and implants to hospitals, surgeons, distributors, sales
20 representatives, sales agents and others throughout the United States, including in this judicial
21 district; and by aiding, assigning and encouraging hospitals, surgeons and others to practice the
22 steps of these claims throughout the United States, including in this judicial district.

23 16. S&N has contributed to infringement by hospitals, surgeons and others to
24 infringe at least claims 2, 4, 10, 13, 15, 23, 25, 26 and 27 of the '822 patent under 35 U.S.C.
25 § 271(c) by, among other activities, designing and making S&N TKA tibial instruments, S&N
26 TKA techniques and S&N implants; by offering for sale, selling, importing, exporting,
27 providing and distributing these instruments, techniques and implants to hospitals, surgeons,

1 distributors, sales representatives, sales agents and others throughout the United States,
2 including in this judicial district; and by aiding, assisting and encouraging hospitals, surgeons
3 and others to practice the steps of these claims throughout the United States, including in this
4 judicial district.

5 17. S&N's unlawful acts of infringement of the '822 patent will continue unless
6 enjoined by this Court.

7 **Infringement of the '368 Patent**

8 18. In addition to the S&N TKA tibial instruments identified above, S&N has
9 designed, made, marketed, provided, distributed, offered for sale, sold and otherwise promoted
10 and encouraged the use of Visionaire Patient Matched femoral cutting blocks for use with the
11 Visionaire Patient Matched Surgical Procedure and S&N implants.

12 19. The Visionaire Patent Matched femoral cutting blocks were designed, made and
13 adapted, and have been marketed, promoted, provided, distributed, offered for sale and sold, for
14 use in performing the Visionaire Patient Matched Surgical Procedure and are not staple articles
15 or commodities of commerce suitable for substantial non-infringing use.

16 20. The Visionaire Patient Matched Surgical Procedure was designed, made and
17 adapted, and have been marketed, promoted, provided and distributed, for use with the S&N
18 Visionaire Patient Matched femoral cutting blocks and is not a staple article or commodity of
19 commerce suitable for substantial non-infringing use.

20 21. S&N has actively induced hospitals, surgeons, distributors, sales representatives,
21 sales agents and others to infringe at least claims 1-5, 8-13 and 16 of the '368 patent under
22 35 U.S.C. § 271(b) by, among other activities, designing and making Visionaire Patient
23 Matched femoral cutting blocks, the Visionaire Patient Matched Surgical Procedure and S&N
24 implants; by offering for sale, selling, importing, exporting, providing and distributing these
25 instruments, techniques and implants to hospitals, surgeons, distributors, sales representatives,
26 sales agents and others throughout the United States, including in this judicial district; and by
27 aiding, assisting and encouraging hospitals, surgeons, distributors, sales representatives, sales

1 agents and others to practice the steps of these claims throughout the United States, including in
2 this judicial district.

3 22. S&N has contributed to the infringement of at least claims 1-5, 8-13 and 16 of
4 the '368 patent by hospitals, surgeons, distributors, sales representatives, sales agents and
5 others under 35 U.S.C. § 271(c) by, among other activities, designing and making Visionaire
6 Patient Matched femoral cutting blocks, the Visionaire Patient Matched Surgical Procedure and
7 S&N implants; by offering for sale, selling, importing, exporting, providing and distributing
8 these instruments, techniques and implants to hospitals, surgeons, distributors, sales
9 representatives, sales agents and others throughout the United States, including in this judicial
10 district; and by encouraging hospitals, surgeons, distributors, sales representatives, sales agents
11 and others to practice the steps of these claims throughout the United States, including in this
12 judicial district.

13 23. S&N has actively induced hospitals, surgeons and others to infringe at least
14 claims 1-5, 8-13 and 16 of the '368 patent under 35 U.S.C. § 271(b) by, among other activities,
15 designing and making Visionaire Patient Matched femoral cutting blocks, the Visionaire
16 Patient Matched Surgical Procedure and S&N implants; by offering for sale, selling, importing,
17 exporting, providing and distributing these instruments, techniques and implants to hospitals,
18 surgeons, distributors, sales representatives, sales agents and others throughout the United
19 States, including in this judicial district; and by aiding, assigning and encouraging hospitals,
20 surgeons and others to practice the steps of these claims throughout the United States, including
21 in this judicial district.

22 24. S&N has contributed to infringement by hospitals, surgeons and others to
23 infringe at least claims 1-5, 8-13 and 16 of the '368 patent under 35 U.S.C. § 271(c) by, among
24 other activities, designing and making Visionaire Patient Matched femoral cutting blocks, the
25 Visionaire Patient Matched Surgical Procedure and S&N implants; by offering for sale, selling,
26 importing, exporting, providing and distributing these instruments, techniques and implants to
27 hospitals, surgeons, distributors, sales representatives, sales agents and others throughout the

1 United States, including in this judicial district; and by aiding, assisting and encouraging
2 hospitals, surgeons and others to practice the steps of these claims throughout the United States,
3 including in this judicial district.

4 25. S&N has been aware of the claims of the '368 patent and their direct application
5 to at least the Visionaire Patient Matched femoral cutting blocks, the Visionaire Patient
6 Matched Surgical Procedure and the S&N implants since July 8, 2011.

7 **Notice and Willfulness**

8 26. Hudson has complied with the marking and notice requirements of 35 U.S.C.
9 § 287.

10 27. S&N's infringement has been and continues to be intentional and deliberate in
11 violation of 35 U.S.C. § 284. As stated above, S&N has acted with knowledge of Hudson's
12 '822 patent and its direct application to the S&N TKA tibial instruments, the S&N TKA
13 techniques and the S&N implants but has not taken steps to avoid infringement. S&N also has
14 acted with knowledge of Hudson's '368 patent and its direct application to the Visionaire
15 Patient Matched femoral cutting blocks, the Visionaire Patient Matched Surgical Procedure and
16 S&N implants, but has not taken steps to avoid infringement. Instead, S&N has continued to
17 infringe the '822 patent and the '368 patent in an objectively reckless manner.

18 28. Hudson has been injured by S&N's ongoing, willful infringement of the '822
19 patent and the '368 patent and is entitled to recover damages adequate to compensate Hudson
20 for infringement of the '822 patent and the '368 patent.

21 29. S&N's infringement has injured and will continue to injure Hudson, unless and
22 until this Court issues an injunction prohibiting further infringement and, specifically, enjoining
23 further manufacture, use, offers for sale, sale and importation of the S&N TKA instruments, the
24 S&N TKA techniques and the S&N implants.

REQUESTED RELIEF

WHEREFORE, Hudson requests that a judgment be entered as follows:

- A. An injunction prohibiting S&N, and all those acting in concert or participation with S&N, from further acts of infringement of the '822 patent;
- B. An injunction prohibiting S&N, and all those acting in concert or participation with S&N, from further acts of infringement of the '368 patent;
- C. An award to Hudson of such damages as it can prove at trial against S&N sufficient to fully and adequately compensate Hudson for the acts of infringement that have occurred, said damages to be no less than a reasonable royalty;
- D. An award to Hudson for any damages so determined that are found for willful infringement, pursuant to 35 U.S.C. § 284, together with prejudgment interest;
- E. An award to Hudson of costs and its reasonable attorneys' fees; and
- F. Such other relief as this Court and the jury may determine to be proper and just.

JURY DEMAND

A trial by jury is hereby demanded on all issues triable to a jury in this case.

DATED this 21st day of September, 2011.

Davis Wright Tremaine LLP

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Attorneys for Hudson Surgical Design,
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2011, I electronically filed the foregoing with the court using the CM/ECF system and I caused to be served a true and correct copy of the following document(s) by the method indicated below and addressed as follows:

First Amended Complaint for Patent Infringement

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☐ U.S. Mail
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☐ Overnight Mail
☐ Facsimile
☒ CM/ECF Notification
☒ Email

DATED this 21st day of September, 2011.

s/Stuart R. Dunwoody
Stuart R. Dunwoody