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17 Attorneys for Plaintiff Extremity Medical, LLC

18 **UNITED STATES DISTRICT COURT**

19 **DISTRICT OF ARIZONA**

20 Extremity Medical, LLC,

21 Plaintiff,

22 vs.

23 Fusion Orthopedics, LLC,

24 Defendant.

No. CV-22-00723-PHX-GMS

**EXTREMITY MEDICAL, LLC'S
RESPONSE TO DEFENDANT
FUSION ORTHOPEDICS,
LLC'S FIRST SET OF
INTERROGATORIES (NOS. 1-6)**

25 Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff Extremity
26 Medical, LLC ("Extremity Medical"), by and through its counsel Kelley Drye & Warren LLP,
27 hereby responds and objects to Defendant Fusion Orthopedics, LLC's ("Fusion") First Set of
28 Interrogatories (the "Interrogatories") as follows:

GENERAL OBJECTIONS

In addition to the objections set forth separately in the responses below ("Specific
Objections"), Extremity Medical's responses to Fusion's Interrogatories are provided subject to
the following General Objections, to which reference is hereby made with respect to each such

Fusion Orthopedics
Ex. 1010

1 response, whether or not specifically referred to therein. Each response is qualified by these
2 General Objections.

3 1. Extremity Medical objects to the Interrogatories to the extent they seek to impose
4 discovery obligations beyond those required by the Federal Rules of Civil Procedure or Local
5 Rules of the United States District Court for the District of Arizona (“Local Rules”).

6 2. Extremity Medical objects to the Interrogatories to the extent they seek information
7 protected by the attorney-client privilege, the attorney work-product doctrine, the common
8 interest privilege, or any other applicable privilege or immunity. Inadvertent production of any
9 information that is privileged, protected from disclosure, or otherwise immune from discovery
10 shall not constitute a waiver of any privilege or protection or of the right to object to the use of
11 the information that was inadvertently produced. Extremity Medical reserves the right to recall
12 from discovery any inadvertently produced information that is protected by the attorney-client
13 privilege, the work-product doctrine, the common interest privilege, or any other applicable
14 privilege or immunity.

15 3. Extremity Medical objects to the Interrogatories to the extent they are overly broad,
16 unduly burdensome, or seek information that is not relevant to the claims or defenses of any
17 party.

18 4. Extremity Medical objects to the Interrogatories to the extent they are not
19 proportional to the needs of the case.

20 5. Extremity Medical objects to the Interrogatories to the extent they seek the
21 disclosure of information or production or identification of documents not within Extremity
22 Medical’s possession, custody, or control.

23 6. Extremity Medical objects to the Interrogatories to the extent they are duplicative
24 and/or compound.

25 7. Extremity Medical expressly reserves: (i) any objections as to the competency,
26 relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any response
27 to the Interrogatories; (ii) the right to object on any ground to the use of any response to the
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Interrogatories at any hearing, trial, or other point during this action; (iii) the right to object on any ground at any time to a demand for further responses to the Interrogatories; and (iv) the right to amend, supplement, modify, or correct its responses and objections to the Interrogatories.

8. Extremity Medical objects to the Interrogatories to the extent they seek information that is publicly available, that is otherwise equally accessible to Fusion, that has been made available to Fusion, or that is more appropriately sought from third parties.

9. Extremity Medical objects to the Interrogatories to the extent they improperly seek the disclosure of proprietary, confidential, trade secret, sensitive, or commercially valuable business information, and similarly protected information of Extremity Medical or other persons or entities, subject to any protective order entered in this case.

10. Extremity Medical objects to the Interrogatories to the extent they contain legal conclusions or the application of law to facts that are subject to dispute in this action.

11. Extremity Medical objects to the Interrogatories to the extent they assume facts which are incorrect, unsupported by evidence, or otherwise unsubstantiated.

12. Extremity Medical objects to the Interrogatories to the extent that they are vague, ambiguous, susceptible to more than one interpretation, or fail to define specific terms necessary to comprehend the Interrogatories.

13. Extremity Medical objects generally to the “Definitions” and “Instructions” to the extent that they are inconsistent with or seek to impose any differing or additional obligations beyond those imposed by the Federal Rules of Civil Procedure, the Local Rules, any standing order, any other applicable statute, rule, or regulation, any orders issued by the Court in this action, and/or any agreements among the parties regarding discovery.

14. Extremity Medical objects to the definition of “Extremity,” “Plaintiff,” “you,” and “your” as overly as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. For purposes of responding to the Interrogatories, Extremity Medical interprets each of these terms as covering only Extremity Medical.

1 15. Extremity Medical objects to the definition of “Prior Art” as both vague and
2 ambiguous to the extent it purports to include references or disclosures “taken individually or in
3 combination.” Accordingly, in Extremity Medical’s responses, the term “Prior Art” refers to and
4 is limited to how it is used in in 35 U.S.C. §§ 102 and 103.

5 16. Extremity Medical objects to the definition of and instructions pertaining to the
6 term “Documents” to the extent it purports to impose conditions, obligations, or duties beyond
7 those required by Federal Rules of Civil Procedure 26 and 34. For purposes of responding to the
8 Interrogatories, Extremity Medical interprets the term “Document” in accordance with the
9 meaning of “documents or electronically stored information” found in the Federal Rules of Civil
10 Procedure.

11 17. Extremity Medical’s objections and responses to the Interrogatories are based upon
12 information known to Extremity Medical through reasonable investigation thus far, and are
13 subject to amendment, supplementation, and/or other modification. Discovery in this matter is
14 ongoing, and during the course of subsequent discovery, Extremity Medical may become aware
15 of additional information that may be responsive to these Interrogatories and could give rise to
16 additional objections. Extremity Medical thus reserves the right to update, amend, supplement,
17 or otherwise modify these objections along with its forthcoming responses. By providing these
18 responses, Extremity Medical does not, and does not intend to, waive its right to rely on evidence
19 or information that is subsequently discovered through its continuing investigation, and these
20 responses are made without prejudice to Extremity Medical’s right to present additional evidence
21 or contentions at trial based upon information hereafter obtained or developed.

22 18. By identifying or producing any information, documents, or things in response to
23 any Interrogatory, Extremity Medical does not stipulate, and expressly reserves all objections, to
24 the authenticity, relevance, materiality, and admissibility of any such documents and things.

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INTERROGATORY NO. 1:

Separately for each Asserted Claim of each Asserted Patent, describe in detail the circumstances concerning the conception and reduction to practice of the claimed subject matter including (without limitation): (1) the earliest date You contend the claimed subject matter was conceived; (2) the earliest date You contend the claimed subject matter was reduced to practice; (3) all work performed to reduce the claimed subject matter to practice; (4) all Communications (e.g., meetings, calls, formal and informal discussions) relating to the claimed subject matter prior to reduction to practice, including the date and location thereof and the identify of all individual involved; (5) the contributions of each named inventor to the claimed subject matter; and (6) a identification (by bates number where applicable) of all Documents and Things evidencing the foregoing.

RESPONSE TO INTERROGATORY NO. 1:

Extremity Medical incorporates by reference its General Objections and further objects as follows: Extremity Medical objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work-product doctrine, the common interest privilege, and/or any other applicable privilege or immunity.

Subject to the foregoing specific objections and applicable general objections, Extremity Medical states that the inventors conceived of the claimed subject matter at least as early as October 13, 2009. *See, e.g.*, XM_Fusion_000021-XM_Fusion_000022. The inventions were reduced to practice at least as early as February 11, 2010, the date on which U.S. Patent Application No. 12/658,680 was filed at the U.S. Patent and Trademark Office.

Extremity Medical's discovery and investigation in connection with this case is ongoing. Extremity Medical reserves the right to supplement, amend, and/or correct this response for any reason and at any time, including pursuant to Federal Rule of Procedure 26(e).

1 **INTERROGATORY NO. 2:**

2 Separately for each Asserted Claim of the Asserted Patents that You contend is infringed
3 describe in detail all evidence that supports or refutes Your contention that Fusion has infringe
4 the claim, including without limitation: (1) all evidence that supports or refutes Your contention
5 that Fusion directly infringed the claim, including the identity of all Persons that You contend
6 directly infringed the claim on Fusion's behalf; (2) all evidence that supports or refutes Your
7 contention that Fusion induced others to directly infringe the claim, including the identity of all
8 Persons that you contend were induced by Fusion to directly infringe the claim; (3) all evidence
9 that supports or refutes Your contention that Fusion contributed to the direct infringement of the
10 claim by another, including the identity of all Persons whose direct infringement you contend
11 Fusion contributed to; and (4) an identification (by bates number where applicable) of all
12 Documents and Things evidencing the foregoing.

13 **RESPONSE TO INTERROGATORY NO. 2:**

14 Extremity Medical incorporates by reference its General Objections and further objects as
15 follows: Extremity Medical objects to this Interrogatory to the extent it seeks information,
16 documents and/or things that are not within Extremity Medical's possession, custody or control.
17 Extremity Medical further objects to this Interrogatory because it seeks information, documents
18 and/or things that are publicly available and/or equally or more readily available to Fusion.
19 Extremity Medical further objects to this Interrogatory to the extent it calls for legal conclusions
20 and/or expert opinions.

21 Subject to the foregoing specific objections and applicable general objections, Extremity
22 Medical responds as follows: Extremity Medical incorporates by reference, as if fully set forth
23 herein, the Complaint filed in this action (ECF No. 1) and Extremity Medical's Infringement
24 Contentions, including the documents cited therein. Such documents include the IntraLock
25 Surgical Technique Guide, which is and has been publicly available for download on Fusion's
26 website at a link associated on Fusion's website with the Accused Product, and has been used by
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1 Fusion to induce its customers to infringe U.S. Patent No. 11,298,166 (“the ’166 Patent”). *See*
2 XM_Fusion_000001-XM_Fusion_000020.

3 Persons who have directly infringed on Fusion’s behalf include Fusion employees and
4 agents of Fusion, including Fusion sales representatives, who have offered for sale and sold the
5 Accused Products, the specific identity of whom is known and more readily available to Fusion.
6 Persons who were induced by Fusion to directly infringe, and Persons to whose direct
7 infringement Fusion has contributed include, but are not limited to, Fusion’s customers to whom
8 Fusion has sold the Accused Products and whom Fusion induced to use the Accused Products,
9 the specific identity of whom is known and more readily available to Fusion.

10 Extremity Medical’s discovery and investigation in connection with this case is ongoing.
11 Extremity Medical reserves the right to supplement, amend, and/or correct this response for any
12 reason and at any time, including pursuant to Federal Rule of Procedure 26(e).

13 **INTERROGATORY NO. 3:**

14 State all factual and legal bases that support or refute Your damages claim against Fusion
15 including without limitation: (1) all facts and legal bases that support or refute Your claim for
16 reasonably royalty, lost profits, price and market erosion, statutory damages, costs, expenses, an
17 reasonable attorney fees; (2) all facts that You will rely on as relevant to determining a reasonable
18 royalty, and all facts that You will rely on as relevant to each of the fifteen factors set out in
19 *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970); and
20 (3) an identification of all Documents (by bates number where applicable), Things, and witnesses
21 that support or refute Your damages claim.

22 **RESPONSE TO INTERROGATORY NO. 3:**

23 Extremity Medical incorporates by reference its General Objections and further objects as
24 follows: Extremity Medical objects to this Interrogatory to the extent it seeks information,
25 documents and/or things that are not within Extremity Medical’s possession, custody or control.
26 Extremity Medical further objects to this Interrogatory because it seeks information, documents
27 and/or things that are publicly available and/or equally or more readily available to Fusion,
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1 including documents and information that disclose Fusion's sales of the Accused Products,
2 Fusion's profits, costs and expenses associated with such sales, and the policies, practices, and
3 procedures Fusion follows, uses, or employs with respect to taking licenses under third party
4 patents. Extremity Medical further objects to this Interrogatory as premature to the extent it calls
5 for legal conclusions and/or expert opinions. The Court's Scheduling Order does not require
6 Extremity Medical to provide its damages theories and calculations at this time.

7 Subject to the foregoing specific objections and applicable general objections, Extremity
8 Medical responds as follows: Extremity Medical is at least entitled to "damages adequate to
9 compensate for [Fusion's] infringement but in no event less than a reasonable royalty for the use
10 made of the invention by [Fusion], together with interest and costs as fixed by the court." 35
11 U.S.C. § 284. Extremity Medical further incorporates by references, as if fully set forth herein,
12 the Complaint filed in this action (ECF No. 1).

13 Extremity Medical's discovery and investigation in connection with this case is ongoing.
14 Extremity Medical reserves the right to supplement, amend, and/or correct this response for any
15 reason and at any time, including pursuant to Federal Rule of Procedure 26(e).

16 **INTERROGATORY NO. 4:**

17 Separately for each Asserted Claim, state the earliest effective filing date(s) to which each
18 such claim is entitled, and state the complete factual and legal basis for such contention(s)
19 including a description of where support exists for each element of the claim in the application
20 relied upon for an earlier effective filing date.

21 **RESPONSE TO INTERROGATORY NO. 4:**

22 Extremity Medical incorporates by reference its General Objections and further objects as
23 follows: Extremity Medical objects to this Interrogatory to the extent it calls for legal conclusions
24 and/or expert opinions.

25 Subject to the foregoing specific objections and applicable general objections, Extremity
26 Medical responds as follows: The earliest effective filing date to which each claim is entitled is
27 no later than February 11, 2010, the date on which U.S. Patent Application No. 12/658,680 was
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1 filed at the U.S. Patent and Trademark Office. Support for each element of the claims can be
2 found throughout that application as filed, including at least Figures 8-11 and 18, and the
3 associated disclosures in the specification, including the disclosures at page 19, line 12 to page
4 25, line 9 and page 33, line 3 to page 35, line 14.

5 Extremity Medical's discovery and investigation in connection with this case is ongoing.
6 Extremity Medical reserves the right to supplement, amend, and/or correct this response for any
7 reason and at any time, including pursuant to Federal Rule of Procedure 26(e).

8 **INTERROGATORY NO. 5:**

9 Describe in complete detail all actions and efforts you or your licensee(s) made to comply
10 with 35 U.S.C. § 287(a), including all actions and efforts to give notice to the public that an
11 product or article made, sold, or offered for sale by you or your licensee(s) is patented under the
12 Asserted Patent, including any manner of marking, the date when such marking first began, the
13 duration of such marking, any periods when such marking ceased, any products that were not
14 marked, the use of any of your websites or products in your marking efforts and the dates when
15 such efforts were made, and any efforts to enforce marking by licensees. Identify all responsive
16 documents and the three people most knowledgeable about your response to this interrogatory.

17 **RESPONSE TO INTERROGATORY NO. 5:**

18 Extremity Medical incorporates by reference its General Objections. Subject to the
19 applicable general objections, Extremity Medical responds as follows: Extremity Medical is not
20 presently aware of any notice to the public, pursuant to 35 U.S.C. § 287(a), that a product is
21 patented under the Asserted Patent. Extremity Medical has not sold any product patented under
22 the Asserted Patent since the date the Asserted Patent issued.

23 Extremity Medical's discovery and investigation in connection with this case is ongoing.
24 Extremity Medical reserves the right to supplement, amend, and/or correct this response for any
25 reason and at any time, including pursuant to Federal Rule of Procedure 26(e).

1 **INTERROGATORY NO. 6:**

2 Identify any product, whether Extremity's own products or those of others, that is covered
3 or the use of which is covered by any claims of the Asserted Patent, and describe in complete
4 detail how those products meet the claims of the Asserted Patent. Identify all responsive
5 documents and the three people most knowledgeable about your response to this interrogatory.

6 **RESPONSE TO INTERROGATORY NO. 6:**

7 Extremity Medical incorporates by reference its General Objections and further objects as
8 follows: Extremity Medical objects to this Interrogatory to the extent it seeks information
9 protected by the attorney-client privilege, the work-product doctrine, the common interest
10 privilege, and/or any other applicable privilege or immunity. Extremity Medical further objects
11 to this Interrogatory to the extent it calls for legal conclusions and/or expert opinions. Extremity
12 Medical also objects to this Interrogatory as unduly burdensome and harassing to the extent it is
13 duplicative of Interrogatory No. 2.

14 Subject to the foregoing specific objections and applicable general objections, Extremity
15 Medical responds as follows: Other than the Accused Products, Extremity Medical has not
16 identified any product that is covered, or the use of which is covered, by any claims of the
17 Asserted Patent. Regarding the Accused Products, Extremity Medical incorporates by reference
18 its Response to Interrogatory No. 2.

19 Extremity Medical's discovery and investigation in connection with this case is ongoing.
20 Extremity Medical reserves the right to supplement, amend, and/or correct this response for any
21 reason and at any time, including pursuant to Federal Rule of Procedure 26(e).

22
23 DATED February 21, 2023.

24 By /s/ Michael J. Zinna

25 **KELLEY DRYE & WARREN LLP**

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LLC

CERTIFICATE OF SERVICE

I hereby certify that on this day a true and correct copy of the foregoing document was served on counsel for Defendant by electronic mail.

Dated: February 21, 2023

By: /s/ David Lindenbaum
David Lindenbaum