World-renowned Orthopedic Surgeon Sues Medical Device Company For Breach Of Contract

The Associated Press

Andrew Cappuccino, M.D., a world-renowned orthopedic surgeon based in Buffalo, has filed a lawsuit in U.S. District Federal Court, Southern District of California, accusing NuVasive, Inc., of breach of contract.

In a civil complaint filed today, Dr. Cappuccino charges NuVasive, a Delaware corporation, with principal offices in San Diego, with failure to pay a $660,000 "milestone payment" tied to Federal Drug Administration (FDA) approval of a medical device. The device, used in spinal procedures, was developed by Cervitech, Inc., a company in which Dr. Cappuccino was a prime investor and which was acquired by NuVasive.

The California company acquired New Jersey-based Cervitech in April 2009, in cash and stock deal valued at $80 million, contingent on FDA approval of Cervitech's cervical disc-replacement device. NuVasive agreed to pay $47 million upfront and another $33 million when government approval was granted.

Under terms of the share-purchase agreement, Dr. Cappuccino and his fellow Cervitech inventors were to receive payments within 30 days of FDA approval of the Cervitech-developed device. That approval was granted on October 26, and all other former Cervitech shareholders were paid with the exception of Dr. Cappuccino.

The surgeon is seeking the payment promised him under the share purchase agreement, as well as interest from the day of the breach and attorneys' fees and costs.

Alan J. Bozer, a partner with Buffalo-based Phillips Lytle LLP, one of Western New York's best-known law firms, who represents Dr. Cappuccino in this matter, said that NuVasive has admitted that payment is due to Dr. Cappuccino but is withholding payment for reasons unrelated to the Cervitech matter.

Chapin Fitzgerald LLP, of San Diego, CA, is Dr. Cappuccino's co-counsel in the breach of contract claim.

Dr. Cappuccino is a spine surgeon with Buffalo Spine Surgery (www.buffalospinesurgery.com [1]) in Lockport, N.Y., and has served on the medical staff of the Buffalo Bills for many years. In addition to his work on the artificial cervical disc, he led the field in bringing minimally invasive and lateral spine surgery, disc replacement and spine motion preservation as the new standards of care for spine surgery.

He attracted international attention in the medical and sports worlds as the orthopedic surgeon who treated Buffalo Bills football player Kevin Everett for his cervical spine injury suffered in a game in 2007. Dr. Cappuccino's use of induced hypothermia garnered world-wide headlines for the technique that likely staved off paralysis in the player.

Dr. Cappuccino's areas of expertise include cervical spine disorders, degenerative disc disease, lumbar spine disorders and degenerative spinal conditions, among others. He was one of the first surgeons to be certified by the American Board of Spine Surgery. He is also a fellow of the American Academy of Orthopedic Surgeons, diplomat of the American Board of Spinal Surgery Charter and a fellow of the American College of Surgeons.

He ended his consultancy position with NuVasive in 2011 and now serves as chair of the Surgeon Advisory Board of Lanx, a Colorado-based medical- device company focused on developing innovative devices for spinal surgery. The board consists of neurosurgeons and orthopedic spine surgeons from around the world who provide guidance to the company Phillips Lytle LLP, established in 1834, is a multi-disciplined law firm with offices in New York State and Canada. The firm represents a diverse, multinational client base, including Fortune 500 companies, global, regional and local financial institutions, mid-sized and emerging businesses, and individuals on important matters affecting their businesses and personal wealth. For more information, visit www.phillipslytle.com [2] .

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