

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE CATHY ANN BENCIVENGO
UNITED STATES DISTRICT JUDGE PRESIDING

WARSAW ORTHOPEDIC, INC.;)	
MEDTRONIC SOFAMOR DANEK, USA)	
INC.; MEDTRONIC PUERTO RICO)	NO. 12-CV-2738-CAB
OPERATIONS CO.; AND OSTEOTECH,)	NO. 08-CV-1512-CAB
INC.,)	
)	
PLAINTIFFS,)	MARCH 29, 2016
)	
VS.)	
NUVASIVE, INC.,)	TELEPHONIC STATUS CONFERENCE
)	(REDACTED VERSION)
DEFENDANT.)	

FOR THE PLAINTIFFS:	LUKE L. DAUCHOT
	KIRKLAND & ELLIS, LLP
	333 SOUTH HOPE STREET
	LOS ANGELES, CA 90071

FOR THE DEFENDANT:	PAUL D. TRIPODI, II
	NATALIE J. MORGAN
	WENDY L. DEVINE
	WILSON SONSINI GOODRICH & ROSATI
	PROFESSIONAL CORPORATION
	633 WEST FIFTH STREET, SUITE 1550
	LOS ANGELES, CA 90071-2027

THE COURT REPORTER:	GAYLE WAKEFIELD, RPR, CRR
---------------------	---------------------------



1 MARCH 29, 2016

2 MORNING SESSION

3 THE CLERK: LADIES AND GENTLEMEN, WE ARE ON THE RECORD
4 AT THIS TIME. CALLING MATTERS 1 AND 2 ON OUR CALENDAR; MATTER
5 NUMBER, 12-CV-2738-CAB-MDD, WARSAW ORTHOPEDIC, INCORPORATED, ET
6 AL VS. NUVASIVE, INCORPORATED, AND THEN MATTER NUMBER 2,
7 08-CV-1512-CAB-MDD, MEDTRONIC SOFAMOR DANEK USA, INCORPORATED,
8 ET AL VS. NUVASIVE, INCORPORATED.

9 THESE MATTERS ARE BOTH ON CALENDAR FOR TELEPHONIC
10 STATUS CONFERENCE, AND ALL PARTIES ARE APPEARING
11 TELEPHONICALLY. IF WE COULD HAVE COUNSEL FOR PLAINTIFF WARSAW
12 PLEASE STATE THEIR APPEARANCES.

13 MR. DAUCHOT: GOOD MORNING, YOUR HONOR, LUKE DAUCHOT,
14 ON BEHALF OF THE PLAINTIFFS.

15 THE CLERK: COUNSEL FOR DEFENDANT NUVASIVE, PLEASE.

16 MR. TRIPODI: GOOD MORNING, YOUR HONOR, PAUL TRIPODI OF
17 WILSON SONSINI ON BEHALF OF NUVASIVE. ALSO ON THE LINE TODAY
18 IS REPRESENTATIVE JAMES GARRETT, AS WELL AS OTHER WILSON
19 LAWYERS INVOLVED IN THE CASE, NATALIE MORGAN AND WENDY DEVINE.

20 THE COURT: ALL RIGHT. THANK YOU.

21 I'M SORRY FOR THE DELAY. WE WERE HAVING SOME TECHNICAL
22 PROBLEMS HERE WITH OUR EQUIPMENT, BUT I THINK WE'RE ALL ONBOARD
23 NOW.

24 I NOTICED THIS STATUS CONFERENCE IN BOTH CASES. I
25 WANTED TO ADDRESS THE STATUS FIRST IN THE '12 CASE AS TO THE

1 SCOPE OF POTENTIAL RESOLUTION AND WHAT IT WAS GOING TO MEAN,
2 JUST FOR MY OWN SORT OF SCHEDULING AND KNOWLEDGE.

3 THERE ARE A NUMBER OF PATENTS IN THIS CASE THAT ARE
4 STILL IN IPR IN ONE FORM OR ANOTHER, AND -- WELL, ACTUALLY, I
5 GUESS THEY'RE OUT OF IPR. THEY'RE ALL ON APPEAL TO THE FEDERAL
6 CIRCUIT.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

THE COURT: ALL RIGHT.

22

MR. TRIPODI, ARE YOU -- DO YOU WANT TO ADD ANYTHING TO

23

THAT?

24

MR. TRIPODI: I APPRECIATE THE CARE THAT MR. DAUCHOT

25

HAS TAKEN IN CHARACTERIZING THIS.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I THINK HIS CHARACTERIZATIONS ARE ACCURATE IN THAT RESPECT.

MR. TRIPODI: YES, YOUR HONOR.

MR. DAUCHOT: THAT'S CORRECT, YOUR HONOR.

THE COURT: OKAY. AS A MORE PRACTICAL MATTER, BECAUSE THERE'S NOTHING IN THAT CASE, WE'VE CONTINUED YOUR DATES IN THE '12 CASE REGARDING THE MOTION FOR RECONSIDERATION AND THEN THE STATUS REPORT ON THE PATENTS THAT ARE IN -- THAT ARE SUBJECT TO THE REVIEW FROM THE PATENT OFFICE.

THE '08 CASE OBVIOUSLY THE BALL IS IN MY COURT ON THE DAUBERT MOTIONS, AND I WAS PREPARED TO EITHER SET A HEARING DATE OR ISSUE AN ORDER, AND I WAS SORT OF ON THE THROES OF WHETHER I WAS GOING TO ACTUALLY HAVE YOU COME IN OR JUST ISSUE AN ORDER. ON THE DAUBERT MOTIONS,

AS WELL AS YOU MAY HAVE NOTICED THAT THE '973 PATENT IS IN FINAL REJECTION FROM THE PATENT OFFICE, AND SO I'M NOT QUITE SURE,

WHAT YOUR POSITIONS ARE REGARDING THE ACTUAL VALIDITY AT THIS POINT OF THE ASSERTED CLAIMS OF THE '973 PATENT, AND WHETHER OR NOT ANY FURTHER SCHEDULING IN THE '08 CASE ON EXPERT ISSUES SHOULD BE SET ASIDE BECAUSE IT SEEMS THAT

1 AT THIS POINT I'M NOT QUITE SURE -- SINCE THE PATENT IS
2 EXPIRED, THE CLAIMS CAN'T BE AMENDED, BUT SOME CLAIMS, IF NOT
3 ALL CLAIMS, MIGHT BE REJECTED/AFFIRMED, WHATEVER, AT THE
4 FEDERAL CIRCUIT LEVEL WHICH MIGHT CHANGE THE ANALYSIS OF THE
5 EXPERTS, AND SO I'M JUST A LITTLE UNCERTAIN WHERE YOU WANT TO
6 GO ON THAT CASE AND WHETHER I SHOULD STAY THAT ONE AS WELL AT
7 THIS POINT.

8 MR. DAUCHOT: THIS IS LUKE DAUCHOT, YOUR HONOR. THE
9 CASE IS IN A PECULIAR POSTURE.

10 THE COURT: YES.

11 MR. DAUCHOT: RIGHT. AND WHAT WE HAVE, IN EFFECT --
12 LET ME BEGIN WITH THE PTO STATUS. WHAT WE HAVE IS A FINAL
13 REJECTION THAT IS GOING TO BE MADE SUBJECT TO FURTHER DISCOURSE
14 WITH THE EXAMINER THROUGH A FILING THAT'S GOING TO BE SUBMITTED
15 I THINK IN MAY. AT THAT POINT, DEPENDING ON WHAT THE EXAMINER
16 DOES, WE'RE -- THE REEXAMINATION'S GOING TO CUT IN OUR FAVOR OR
17 THERE IS GOING TO BE AN APPEAL -- AN ADMINISTRATIVE APPEAL TO
18 THE PTAB.

19 IF THE -- I MEAN, ACCORDING TO THE STATISTICS, THE PTAB
20 WILL DECIDE THE ISSUE ANYWHERE FROM ONE TO TWO YEARS FROM THE
21 DATE OF THE FILING OF THE APPEAL TO THE PTAB, WHICH WOULD TAKE
22 PLACE I THINK IN JULY. AFTER THE PTAB RESOLVES THE ISSUE, SO
23 THEN WE'RE TALKING, YOU KNOW, EITHER JULY OF 2018 OR JULY OF
24 2019, AND MAYBE SOMEWHERE -- LIKELY SOMEWHERE IN BETWEEN, GIVEN
25 THE STATISTICS, THERE'S BEEN AN APPEAL TO THE FEDERAL CIRCUIT

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.