

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

NUVASIVE, INC.  
Petitioner

v.

WARSAW ORTHOPEDICS, INC.  
Patent Owner

---

Case IPR2013-00206  
Patent 8,251,997

---

**PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE**

**TABLE OF CONTENTS**

**I. PROCEDURAL HISTORY ..... 1**

**II. ARGUMENT ..... 1**

**A. EXHIBITS 1001 AND 1014: THE CROCK AFIDAVIT ..... 1**

**i. The Crock Affidavit (Ex. 1001, pp. 54-85 and Ex. 1014) is uncompelled direct testimony in this proceeding and therefore is not hearsay, and even if it were hearsay, it is proper for experts to rely upon hearsay..... 3**

**ii. The Crock Affidavit is also not excludable under FRE 401-402 or 37 CFR §§ 42.22, 42.104 ..... 4**

**iii. Paragraphs 18–22 of the Crock Affidavit are not inadmissible under 35 U.S.C. § 311 ..... 6**

**B. EXHIBITS 1015–1021: CROCK EXHIBITS ..... 6**

**C. EXHIBIT 1029: SECOND MCAFEE DECLARATION ..... 7**

**i. Paragraphs 4, 7, 9–10, 37–39, 43–45, and 48–49 of the Second McAfee Declaration are admissible ..... 8**

**D. EXHIBIT 1030: JACOBSON DECLARATION..... 10**

**i. Paragraphs 4–6, 8, and 10 are admissible and relevant ..... 11**

**E. EXHIBIT 1032: MILES DECLARATION ..... 12**

**F. EXHIBITS 1036 & 1037: FRIEDMAN ARTICLES..... 13**

**G. EXHIBITS 1046, 1049, & 1050 ..... 14**

**H. EXHIBIT 1067: MCAFEE 1998 ARTICLE ..... 14**

**III. NUVASIVE’S REPLY EVIDENCE ..... 15**

**IV. CONCLUSION ..... 15**

## TABLE OF AUTHORITIES

### Statutes

28 U.S.C. § 1746 .....	3, 4
35 U.S.C. § 311 .....	6

### Rules

F.R.E. 801(c)(1) .....	3
F.R.E. 801 .....	4
F.R.E. 802 .....	4
F.R.E. 703 .....	4
F.R.E. 401 .....	4
F.R.E. 402 .....	4

### Regulations

37 CFR § 42.64(b)(1) .....	1
37 CFR § 42.64(b)(2) .....	2
37 CFR § 42.51(b)(1)(ii) .....	2
37 CFR § 42.53(a) .....	3
37 CFR § 1.68 .....	3, 4
37 CFR § 42.65 .....	4
37 CFR § 42.22 .....	4, 5
37 CFR § 42.104 .....	4, 5

## INTRODUCTION

Petitioner NuVasive, Inc. opposes Warsaw's motions to exclude, filed Apr. 25, 2014. Warsaw ignores appropriate uses of evidence. For example, much of the evidence in question is offered to rebut incorrect statements of Warsaw and its expert, Dr. Sachs. Other evidence is offered for background on the state of the art and knowledge of a person of skill in the art, in addition to rebuttal. As set forth below, Warsaw's objections must be denied.

### I. PROCEDURAL HISTORY

The timeline presented by Warsaw is generally accurate. That said, NuVasive does not agree that Warsaw's objections were with "sufficient particularity to allow correction." 37 CFR § 42.64(b)(1). Warsaw's objections were general, and did not identify the particular issues it now addresses in its motion. See Papers 20 and 45.

### II. ARGUMENT

#### A. EXHIBITS 1001 AND 1014: THE CROCK AFIDAVIT

NuVasive submitted, with its Petition as appendices to the Dr. McAfee's declaration, a 1982 Crock paper and a Crock Affidavit that is the subject of Warsaw's motion to exclude. Ex. 1001, pp. 40-53 (1982 Crock paper), pp. 54-85 (Crock Affidavit). The Crock Affidavit is made under oath. See Ex. 1001, p. 56; see *also* Ex. 1014, p. 2. The affidavit complies with Australian Law, and Warsaw makes no contention to the contrary.

Dr. McAfee cites – in a section of his declaration titled "Background Knowledge One of Skill in the Art Would have Had Prior to the Filing of the '997 Patent" – the 1982 Crock

paper and Crock Affidavit as state of the art evidence, that lateral approaches to the spine were known before the '997 patent's earliest claimed priority (1995), and that knowledge came not only from Jacobson, but also from other sources such Dr. Crock's 1982 paper. See Ex. 1001, ¶ 11. On Oct. 21, 2013, in response to Warsaw's objections (Paper 19), NuVasive served Warsaw with the Crock Affidavit as a separate exhibit (later filed as Ex. 1014), and with a complete set of appendices to the Dr. Crock Affidavit (later filed as Ex. 1015-1021). See NuVasive transmittal letter, Oct. 21, 2013, serving supplemental evidence pursuant to 37 C.F.R. § 42.64(b)(2).

Though Warsaw could have cross examined Dr. Crock on this direct testimony as routine discovery, 37 CFR § 42.51(b)(1)(ii), Warsaw chose not to do so. Instead, Warsaw responded with testimony of its expert, Dr. Sachs (Ex. 2038), who contended, incorrectly, that the 1982 Crock paper does not disclose a lateral approach and translaterally positioned implant. See Ex. 2038, ¶¶ 46-48. Dr. Sachs went further, stating lateral approaches had never been done before 1995. See *id.*, ¶ 48. Finally, Dr. Sachs stated, in essence, Dr. Crock testified falsely about his 1982 paper and lateral work in his Affidavit. See *id.*, ¶ 48. Dr. Sachs did this, despite Warsaw having not cross examined Dr. Crock on the issues.

NuVasive, with its Reply, offered evidence responding the Dr. Sachs' opinions related to Dr. Crock's teachings. See, e.g., Ex. 1029, ¶¶ 7, 9, 10, 100. NuVasive submitted the Dr. Crock Affidavit, this time as a separate exhibit (Ex. 1014), as well as a complete set

# 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.