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20 Attorneys for Defendant/Counterclaimant/Counterclaim Defendant
21 NUVASIVE, INC.

22 UNITED STATES DISTRICT COURT
23 SOUTHERN DISTRICT OF CALIFORNIA

24 WARSAW ORTHOPEDIC, INC.,

25 Plaintiff,

26 v.

27 NUVASIVE, INC.,

28 Defendant.

29 NUVASIVE, INC.,

30 Counterclaimant,

31 v.

32 MEDTRONIC SOFAMOR DANEK USA, INC.,

33 Counterclaim Defendant.

34 AND RELATED COUNTERCLAIMS.

Case No. 3:08-CV-1512 MMA (MDD)

**NUVASIVE, INC.'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS RENEWED MOTION
FOR JUDGMENT AS A MATTER OF
LAW OR A NEW TRIAL**

Date: January 24, 2012
Time: 2:30 p.m.
Judge: Hon. Michael M. Anello
Courtroom: 5, 3rd floor

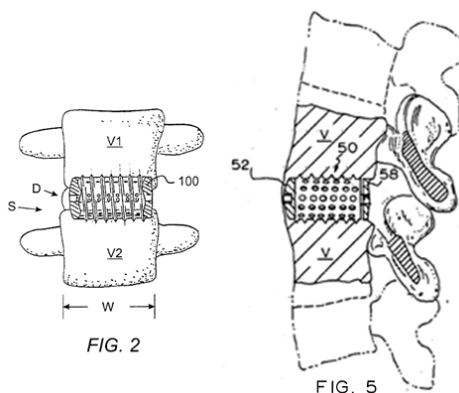
Case No. 3:08-CV-1512 MMA (MDD)

1 Dr. van Dam testified that it would have been obvious to incorporate the ratchetings from the
 2 earlier design into the Brantigan '327 implant. (*Id.*) And, in fact, Dr. Brantigan himself made the
 3 combination in the design of his commercial implants. (DTX-5131; DTX-5995 at N0806418.)
 4 Warsaw cannot overcome this *prima facie* case of obviousness as a matter of law. *Boston Sci.*
 5 *Scimed, Inc. v. Cordis Corp.*, 554 F.3d 982, 990-92 (Fed. Cir. 2009).

6 Because the Brantigan patents disclose all the relevant structures, the Court should enter
 7 JMOL that the Brantigan '327 patent anticipates claims 24, 57, and 61, and renders obvious claims
 8 41 and 42 in combination with Brantigan '757. *See* cases cited at pp. 10, 15.

9 3. Michelson '247 Patent

10 The undisputed facts show that the '247 patent anticipates claim 61 of the '973 patent.
 11 Warsaw admitted that the Michelson '247 patent is prior art. (JX-1 at ¶ 62.) And a comparison of
 12 the implants of Figure 2 of the '973 patent (left) and Figure 5 of the '247 patent (right) shows they
 13 are exactly the same size relative to the vertebrae in which they may be used.



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 21 The '247 patent discloses each limitation of claim 61. First, Warsaw admitted the '247
 22 patent discloses an implant with a length of 26 mm. (JX-1 at ¶ 91; PX-318 at 10:31-36.) That
 23 meets the length requirement in claim 61 because the Court's *Markman* order held, at Warsaw's
 24 urging, that "implants less than 26 mm in length have not been disclaimed and are capable of
 25 meeting the term's limitation." (Doc. No. 149 at 9.) Indeed, a 26 mm length implant is within the
 26 range that the '973 patent gives for its preferred embodiment for the thoracic spine. (PX-326 at
 27 7:26-30.) Moreover, 26 mm is greater than half of the average width of all vertebra between T2
 28 and L5 as shown by the Berry data. (Tr. at 1740:23-1741:11 (van Dam).) Second, the *Markman*

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Dated: October 27, 2011

FISH & RICHARDSON P.C.

By: /s/ Todd G. Miller

Todd G. Miller
Attorneys for Defendant/Counterclaimant/
Counterclaim Defendant NUVASIVE, INC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on October 27, 2011 to all counsel of record who are deemed to have consented to electronic service via the Court’s CM/ECF system per Civ LR 5.4(d). Any other counsel of record will be served by U.S. mail or hand delivery.

By: /s/ Todd G. Miller
Todd G. Miller