

Case IPR2013-00395  
U.S. Patent No. 8,444,696

UNITED STATES PATENT AND TRADEMARK OFFICE  
\_\_\_\_\_  
BEFORE THE PATENT TRIAL AND APPEAL BOARD  
\_\_\_\_\_

NUVASIVE, INC.  
Petitioner

v.

WARSAW ORTHOPEDIC, INC.  
Patent Owner

Patent Number: 8,444,696  
Issue Date: May 21, 2013  
ANATOMIC SPINAL IMPLANT HAVING  
ANATOMIC BEARING SURFACES

\_\_\_\_\_  
Case IPR2013-00395  
\_\_\_\_\_

**WARSAW'S MOTION FOR OBSERVATION REGARDING  
CROSS-EXAMINATION OF DR. BRANTIGAN**

## EXHIBITS

- WARSAW2001 Affidavit of Mr. Luke Dauchot.
- WARSAW2002 Affidavit of Mrs. Nimalka Wickramasekera.
- WARSAW2003 U.S. Patent No. 4,834,757 to Brantigan
- WARSAW2004 U.S. Patent No. 5,425,772 to Brantigan
- WARSAW2005 Declaration of Dr. Charles L. Branch, Jr., M.D.
- WARSAW2006 Curriculum vitae of Dr. Charles L. Branch, Jr., M.D.
- WARSAW2007 Comparison of claim 1 of the '696 patent and claim 1 of the '430 patent.
- WARSAW2008 Comparison of claim 4 of the '696 patent and claim 4 of the '430 patent.
- WARSAW2009 Deposition transcript of Dr. John W. Brantigan, M.D. taken April 7, 2014.
- WARSAW2010 Declaration of Lori Ferrell, CPA, CGMA.
- WARSAW2011 CLYDESDALE® Spinal System Product Information.

Warsaw Orthopedic, Inc. (“Patent Owner”) submits this motion for observation regarding cross-examination of Dr. Brantigan, the reply declarant of Petitioner NuVasive, pursuant to the Board authorization provided via email communication dated June 18, 2014. In lieu of taking an additional deposition of Dr. Brantigan, the parties have agreed to Patent Owner’s use of the prior deposition testimony (taken April 7, 2014) of Dr. Brantigan. Warsaw submits the following observations based on Dr. Brantigan’s prior deposition testimony.

### **Observation 1**

In Exhibit 2009 (at 81:2 to 82:20; and 86:15 to 87:7), Dr. Brantigan concedes that adding ratchetings such as the nubs 122 of Brantigan ‘035 to the intermediate ridges 68, 68a of the spinal disk implant 50 of Senter would cause resistance to insertion thereof between the vertebrae 22a and 22b. This testimony is relevant to the reply declaration of Dr. Brantigan at paragraphs 8 and 9 because Dr. Brantigan now ignores the downside (specifically identified in Senter) of adding ratchetings such as the nubs 122 to the intermediate ridges 68, 68a. Such resistance to insertion is undesirable – Senter indicates that the ridges 68, 68a are “preferably smooth, without serrations, to permit it to be surgically implanted.” (Patent Owner’s Response at 36:1-5; and Senter (Ex. 1007) at 11:30-31.)

Furthermore, Dr. Brantigan in paragraph 8 of the reply declaration considers adding ratchetings such as nubs 122 to the intermediate ridges 68, 68a would be a

“belt-and-suspenders” approach, but such an approach is contrary to the express teachings of Senter.

### **Observation 2**

In Exhibit 2009 (at 92:22-24), Dr. Brantigan indicates that, when placing bone in an opening of the modified spinal disk implant 50 of Senter, “you would put as much bone in there as you could,” and “[t]hat bone would be tending to bulge out beyond the confines of the implant.” This testimony is relevant to the reply declaration of Dr. Brantigan at paragraph 11 because Dr. Brantigan now asserts that “[o]ne of skill in the art would also have known before June 1995, as is known today, that spinal fusion implants do not need to be loaded to the very absolute top of the fusion aperture, in order to facilitate bone growth through the implant from one adjacent vertebra to the other.” During insertion between the vertebrae 22a and 22b, the bone filling the opening of the modified spinal disk implant 50 of Senter would be subject to dislodgement. (Patent Owner’s Response at 44:12-15.) Patent Owner submits that Dr. Brantigan’s changing testimony is relevant to his credibility and to whether one of ordinary skill would modify the spinal disk implant 50 of Senter as suggested by Petitioner NuVasive.

### **Observation 3**

In Exhibit 2009 (at 94:1-22), Dr. Brantigan indicates that the portion of the intermediate ridges 68, 68a of the spinal disk implant 50 of Senter removed to

provide the opening therethrough would be filled with bone-growth promoting material, and that a portion of the bone-growth promoting material that now occupies the cut-away of the intermediate ridge 68 would extend above the posterior ledge 60. Regarding the bone-growth promoting material that extends above that posterior ledge 60, Dr. Brantigan in Exhibit 2009 (at 96:7-8) indicates that “I believe that some of the bone would be scraped off.” This testimony is relevant to the reply declaration of Dr. Brantigan at paragraphs 13 and 14 because Dr. Brantigan now disparages the dislodgement problem identified by Patent Owner. The bone-growth promoting material filling the cut-away of intermediate ridge 68 would not be protected during insertion of the modified spinal disk implant 50 between the vertebrae 22a and 22b. (Patent Owner’s Response at 44:12-15.) As seen in Petitioner NuVasive’s modified Fig. 3 of Senter (Petitioner’s Corr. Petition ‘395 at page 14), the abrupt transition of the intermediate ridge 68 with the posterior ledge 60 does not provide such protection. Furthermore, Dr. Brantigan (reply declaration at paragraph 13) now asserts that, since Medtronic, Inc. (Patent Owner’s parent company) does not identify dislodgement problems associated with the Clydesdale implant, the dislodgement problems identified by Patent Owner regarding the modified spinal disk implant 50 of Senter are not actually a problem. In making these assertions, Dr. Brantigan does not acknowledge his previous indication (“I believe that some of the bone

# 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.