

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NUVASIVE, INC.
Petitioner

v.

WARSAW ORTHOPEDICS, INC.
Patent Owner

Case IPR2013-00395
Patent 8,444,696

**PETITIONER'S RESPONSE TO THE MOTION FOR OBSERVATION REGARDING
CROSS-EXAMINATION OF DR. BRANTIGAN**

Response to the Introduction

This paper responds to Patent Owner's motion for observation regarding cross-examination of Dr. Brantigan, filed June 26, 2014. Patent Owner states in an introductory paragraph that it filed its observations about "Dr. Brantigan's prior sworn testimony" "[i]n lieu of taking additional depositions." However, Petitioner made Dr. Brantigan available to Patent Owner for deposition. It was Patent Owner's choice to comment on Dr. Brantigan's prior testimony and to forgo a deposition in which Dr. Brantigan could explain that the supposed inconsistencies do not exist. Petitioner disagrees with Patent Owner's characterization of Dr. Brantigan's prior testimony as explained below.

Response to Observation No. 1

In Observation No. 1, Patent Owner discusses Dr. Brantigan's prior testimony concerning the addition of ratchetings to the Senter implant. According to Patent Owner Dr. Brantigan, in paragraphs 8 and 9, "now ignores" the resistance to insertion of the modified implant. But Patent Owner does not take into account Dr. Brantigan's testimony in paragraph 7 of the declaration which explains that during implantation the patients weight is not on the vertebra and the vertebra may be distracted lessening any resistance during insertion. Dr. Brantigan provided the same explanation at testimony in his deposition testimony. See Exhibit 2009 at page 85, line 22 to page 86, line 3. No inconsistency exists.

Response to Observation Nos. 2-3

In Observation Nos. 2-3, Patent Owner discusses Dr. Brantigan's prior testimony concerning the placement and potential "scraping off" of fusion material in the modified Senter implant. No contradiction is apparent when reading the Patent Owner's quotes from the declaration and the deposition testimony.

Patent Owner selectively crops Dr. Brantigan's deposition testimony to create the illusion of contradiction. Dr. Brantigan's full answer at deposition is Exhibit 2009 at page 92, line 21 to page, lines 12-15:

A. It's hard for me to understand your distinctions, because you would put as much bone in there as you could. That bone would be tending to bulge out beyond the confines of the implant. During the placement, some of that bone will be scraped off, and then you can pack that beside the implant. But after the bone that's still in there has some time for the sponginess to expand, it will expand to the limits of the implant and have good apposition against the vertebral endplates.

Consistently, Dr. Brantigan testified at page 96, lines 6-12 of Exhibit 2009:

A. I think we are saying the same thing over and over again. I believe that some of the bone will be scraped off. But enough of the bone would remain in there. Particularly, if you've compressed cancellous bone,

you've scraped some of it off, and the rest of it tends to return to its uncompressed height once it's in place.

The complete deposition testimony is consistent with, and in no way contradicts, Dr. Brantigan's testimony on this subject in paragraphs 10 to 14 of his second declaration.

Response to Observation Nos. 4-6

In Observations 4 and 5, Patent Owner discusses the capabilities of nubs to resist motion. Patent Owner asserts that Dr. Brantigan's deposition testimony is "somewhat muted" compared to his second declaration. By using this "somewhat muted" language, Patent Owner is admitting that no contradiction exists between the deposition testimony and declaration.

In Observation 6, Patent Owner again takes snippets of testimony out of context and ignores the declaration testimony that shows Patent Owner's mischaracterization of Dr. Brantigan's testimony. In particular, Patent Owner ignores the citation in paragraph 18 of the declaration that references other paragraphs in the declaration and which fully explain how the ratchetings function differently during insertion and after implantation.

In the case Observations 4-6, a simple review of Dr. Brantigan's full testimony—rather than the cropped quotes provided by Patent Owner—confirms that no contradiction exists.

Response to Observation No. 7

In this Observation, Patent Owner discusses Dr. Brantigan's testimony regarding whether it would be obvious to add ratchetings to an implant with convex upper and lower surfaces. Dr. Brantigan has always said that it would be obvious to make this combination [See, e.g., Ex. 1001 at ¶ 38; Ex. 1017. at ¶¶ 4-9] and Patent Owner does not cite any testimony to the contrary. Patent Owner's argument that this testimony is contradicted by the absence of a disclosure of the claimed combination of features in Dr. Brantigan's implant patents has no force. Moreover, the argument is belied by Dr. Brantigan's observation that even the '696 patent does not disclose any embodiment with the claimed combination of features. Ex. 1017 at ¶ 29.

Response to Observation Nos. 8 -12

In these Observations, Patent Owner disagrees with Dr. Brantigan's declaration testimony describing how Patent Owner mischaracterized Dr. Brantigan's deposition testimony. A review of the relevant testimony fully supports Dr. Brantigan's contention that Patent Owner mischaracterized his deposition testimony.

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