

1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD
3
4

5 _____
6 NUVASIVE, INC.

7 Petitioner,

8 v.

IPR2013-00395

9 WARSAW ORTHOPEDIC, INC. Patent No. 8,444,696

10 Patent Owner
11 _____
12
13
14

15 Deposition of CHARLES BRANCH, JR., M.D.,
16 at 200 West Second Street, Winston-Salem,
17 North Carolina, commencing at 9:13 a.m.,
18 Wednesday, April 23, 2014, before April
19 Marsh, Shorthand Reporter, Notary Public.
20
21
22
23

24 JOB No. 1835912

25 PAGES 1 - 158

Veritext National Deposition & Litigation Services
866 299-5127

1 APPEARANCES OF COUNSEL:
 2
 3 On behalf of the Petitioner:
 4 BY: TODD G. MILLER, Esq.
 5 Fish & Richardson, P.C.
 6 12390 El Camino Real
 7 San Diego, California 92130-2081
 8 858-678-5070
 9 miller@fr.com
 10 -and-
 11 BY: STEPHEN R. SCHAEFER, Esq.
 12 Fish & Richardson, P.C.
 13 3200 RBC Plaza
 14 60 South Sixth Street
 15 Minneapolis, Minnesota 55402
 16 Schaefer@fr.com
 17
 18 On behalf of the Patent Owner:
 19 BY: NIMALKA WICKRAMASEKERA, Esq.
 20 Kirkland & Ellis, LLP
 21 333 South Hope Street
 22 Los Angeles, California 90071
 23 213-680-8400
 24 nimalka.wickramasekera@kirkland.com
 25 -and-
 26 BY: THOMAS H. MARTIN, Esq.
 27 Martin & Ferraro, LLP
 28 1557 Lake O'Pines Street, Northeast
 29 Hartville, Ohio 44632
 30 330-877-0700
 31 tmartin@martinferraro.com

Page 2

1 P R O C E E D I N G S
 2 * * * * *
 3 MR. MILLER: Good morning, Dr. Branch, my
 4 name is Todd Miller. I'm with the law firm of
 5 Fish & Richardson, and I represent NuVasive in
 6 this matter.
 7 MS. WICKRAMASEKERA: Nimalka Wickramasekera
 8 from Kirkland & Ellis on behalf of the witness
 9 and patent owner and with me is Tom Martin from
 10 Martin & Ferraro.
 11 MR. MILLER: And also with me is Tim
 12 Schaefer, also with Fish & Richardson.
 13 CHARLES BRANCH, JR., M.D.,
 14 having been duly sworn, testifies as follows:
 15 EXAMINATION
 16 BY MR. MILLER:
 17 **Q. Would you state your full name, please.**
 18 A. My name is the Charles Leon Branch, Jr.
 19 **Q. And could you tell me what your home**
 20 **address is, please.**
 21 A. My home address is Post Office Box 320, 690
 22 Burton, B-U-R-T-O-N, Road in Advance, North Carolina
 23 27006.
 24 **Q. Thank you. And we talked briefly about**
 25 **this before we started. You've had your deposition**

Page 4

1 I N D E X
 2
 3 WITNESS: CHARLES BRANCH, JR., M.D.
 4 Examination Page
 5 By Mr. Miller 4
 6
 7
 8
 9 EXHIBITS
 10 NUMBER DESCRIPTION PAGE
 11
 12 Exhibit 1015 Picture 54
 13 Exhibit 1016 Picture 54
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 3

1 **taken before?**
 2 A. Yes, I have.
 3 **Q. About how many times?**
 4 A. Several. A dozen -- two dozen.
 5 **Q. So I'm going to assume that you're familiar**
 6 **with the ground rules that we follow, but I'll go**
 7 **over a few of them just to make sure we're on the**
 8 **same page. All right?**
 9 A. Perfect.
 10 **Q. I'm going to be asking you questions today**
 11 **and you need to answer them. Do you understand that?**
 12 A. Yes.
 13 **Q. And for the court reporter's benefit, we**
 14 **just need to speak one at a time. So I'll wait for**
 15 **you to finish talking before I start talking and ask**
 16 **that you do the same. Okay?**
 17 A. I will.
 18 **Q. And the court reporter needs audible**
 19 **responses -- you've been really good at that --**
 20 **"yeses" and "noes," no "uh-huh" or "huh-uhs" or head**
 21 **nods. All right?**
 22 A. I understand.
 23 **Q. And we'll take breaks about every hour or**
 24 **whenever you need them. One thing that you may not**
 25 **be familiar with is, in this procedure, you can't**

Page 5

1 **talk about the substance of your deposition with**
2 **counsel during the breaks. All right?**
3 A. I understand.
4 **Q. I don't know if that's a new rule to you or**
5 **not. Some courts vary. This one is very strict**
6 **about that. So they're not being rude when they say**
7 **they can't talk to you about your deposition. Okay?**
8 A. I understand.
9 **Q. And do you understand that you're here**
10 **testifying under oath?**
11 A. I do.
12 **Q. And that's the same oath that you would**
13 **give if you were in a court, right?**
14 A. I understand.
15 **Q. Is there any reason that you can't give**
16 **full and complete testimony today?**
17 A. Not that I'm aware of.
18 **Q. The purpose of the deposition is so that I**
19 **can get your best and complete testimony. So if**
20 **there's anything I ask you during the deposition that**
21 **you don't understand, just ask me to clarify my**
22 **question and I'll do that. Okay?**
23 A. I will.
24 **Q. And if you decide that there's something**
25 **that you need to add or amend today, just go ahead**
Page 6

1 BY MR. MILLER:
2 **Q. Let me be clear. Who is your employer**
3 **outside of this deposition?**
4 A. I work for Wake Forest University Baptist
5 Health System.
6 **Q. And what kind of work do you do for Wake**
7 **Forest?**
8 A. I'm an academic neurosurgeon. I practice
9 neurosurgery, which includes spinal surgery. I train
10 young physicians to be neurosurgeons, and I'm the
11 administrator for the department of neurosurgery, or
12 chief or chair of neurosurgery at Wake Forest Baptist
13 Health.
14 **Q. I saw on your CV, I believe, that you were**
15 **in the department of pediatrics?**
16 A. I have a joint appointment,
17 cross-appointment in the department of pediatrics as
18 well because of my interest in pediatric trauma and
19 the care of children who have been injured.
20 **Q. Do you do pediatric scoliosis surgery?**
21 A. I do not because I have a partner who does,
22 so I encourage him to develop his expertise and help
23 him when he needs me.
24 **Q. Do you do spine fusion surgery on adults?**
25 A. Yes.
Page 8

1 **and tell me that you need to do that and we'll let**
2 **you do that. All right?**
3 A. I will.
4 **Q. All right. Now, in terms of depositions**
5 **that you've given in the past, have any of those**
6 **involved patents?**
7 A. No.
8 **Q. Have any of those involved Medtronic or any**
9 **of its affiliated companies?**
10 A. No.
11 **Q. If I say "Medtronic" today, will you**
12 **understand that that includes the whole variety of**
13 **Medtronic entities, including Warsaw Orthopedic,**
14 **Medtronic Sofamor Danek -- they have a lot of them --**
15 **Puerto Rico, Cayman Islands, the works?**
16 A. I do. I understand.
17 **Q. Okay. Great. Your prior depositions --**
18 **have any of those involved medical devices? And I'll**
19 **exclude malpractice.**
20 A. Right. Not other -- so outside of a
21 medical malpractice or injury condition, no.
22 **Q. Okay. Who do you work for today?**
23 MS. WICKRAMASEKERA: Objection to form.
24 THE WITNESS: I presume you're asking who
25 is actually paying for my time here?
Page 7

1 **Q. How long have you been doing spine fusion**
2 **surgery on adults?**
3 A. 30 years.
4 **Q. In performing spine fusion surgery, do you**
5 **use spine fusion implants?**
6 A. Yes, I do.
7 **Q. And how long have you used spine fusion**
8 **implants in spine fusion surgery?**
9 A. Since about 2000.
10 **Q. And whose implants do you use -- spine**
11 **fusion implants?**
12 A. The majority of the spinal implants I use
13 are developed and produced by Medtronic.
14 **Q. Have you used any non-Medtronic spinal**
15 **fusion implants?**
16 A. In the course of my career, I believe I
17 have, but not recently.
18 **Q. Do you know any particular Medtronic**
19 **implant that you use?**
20 A. Yes, I do.
21 **Q. What would those be?**
22 A. Capstone, Capstone Control, Solera, again,
23 are -- the range of spinal fusion devices, or just
24 interbody implants?
25 **Q. Just the interbody implants.**
Page 9

1 A. So the Capstone and Capstone Control are
2 the two implants that I use almost exclusively.
3 **Q. Do you use the CLYDESDALE?**
4 A. I do not.
5 **Q. Do you do lateral access surgery?**
6 A. Seldom.
7 **Q. When you do -- well, and I use lateral**
8 **access or lateral approach. Do they mean the same**
9 **thing to you?**
10 A. They do.
11 **Q. And when you do a lateral approach spinal**
12 **fusion surgery, what sort of technique do you use?**
13 MS. WICKRAMASEKERA: Objection to form.
14 THE WITNESS: I have infrequently used that
15 approach in my clinical practice, but in cadaver
16 and training and other environments have used
17 the DLIF -- what we call DLIF with an expandable
18 retractor and transpsoas approach, and then more
19 recently what I will call OLIF or an oblique
20 anterolateral fusion that enters the lateral
21 spine with retraction of the psoas muscle in a
22 posterior direction.
23 BY MR. MILLER:
24 **Q. In an OLIF, do you go through the psoas?**
25 A. No.

Page 10

1 **Q. Do you retract the psoas?**
2 A. Yeah.
3 **Q. I take it that you're being compensated for**
4 **your time working on this case?**
5 A. Yes.
6 **Q. What is your hourly rate?**
7 A. \$700 per hour.
8 **Q. How many hours have you worked on this**
9 **case?**
10 A. Approximately 40.
11 **Q. Will you be charging your normal hourly**
12 **rate for the time you spend in deposition today?**
13 A. Yes, I will.
14 **Q. When did you begin working on this case?**
15 A. I believe March the 1st is -- in or around
16 March 1st, February 28th/March 1st is my
17 recollection. It may have been the 15th of February,
18 but I don't have that absolutely in front of me.
19 **Q. Could you describe generally the work that**
20 **you've done on this case?**
21 A. I have had the opportunity to read and
22 study a variety of patents that relate to spinal
23 implants, both spinal fusion implants and spinal disc
24 implants that drive back to the mid-1990s, including
25 the -- what I'll refer to as the '696 patent of Dr.

Page 11

1 Michelson.
2 And subsequently, to read I think what is
3 called an IPR, which is a document that challenges
4 the validity of a patent, and then the responses from
5 Dr. Brantigan in the matter as well, and then
6 ultimately, to generate my own opinion with regard to
7 the concerns that were addressed regarding the
8 validity of the patent in the IPR or IPRs. I think
9 there were two of them. Is that direct?
10 **Q. You're correct.**
11 A. Okay.
12 **Q. So you saved me a question about using the**
13 **last three numbers of the patent. So we'll call**
14 **Michelson patent '696. And you've read that '696**
15 **patent?**
16 A. I have.
17 **Q. Cover to cover?**
18 A. Yes.
19 **Q. How many times?**
20 A. I'm not sure. Several.
21 **Q. Do you know what a patent file history is?**
22 A. I believe I do. I've tried to come to
23 understand that.
24 **Q. What is that?**
25 A. I think that's a -- it's a set of dates and

Page 12

1 numbers or a trail. It's on the front page of the
2 patent that sort of tells when the first filing
3 occurred.
4 And then when there's continuations or
5 modifications or additions to that particular
6 patents, those are memorialized in this sort of
7 stream of dates on the front page of the patent.
8 **Q. Got you. I'm going to show you. I'm going**
9 **to show you what has been previously marked as**
10 **Exhibit 1002. And under -- on the first page of**
11 **Exhibit 1002, it says, "Related U.S. application**
12 **data." Is that what you were referring to as the**
13 **patent file history?**
14 A. That's what I was referring to.
15 **Q. Now, did you read -- I believe you did --**
16 **the NuVasive's request for an inter partes review?**
17 A. I did.
18 **Q. And did you read the -- do you understand**
19 **that that request refers to prior art patents?**
20 A. I believe I did. I've got the -- yes. I
21 had to stop there.
22 **Q. All right. And, for example, the Senter**
23 **771 patent. Did you read the Senter patent?**
24 A. I read a patent that Senter applied. I
25 don't recall whether it was 771.

Page 13

<p>1 Q. All right. We only have one Senter patent. I'll show it to you during the course of the day.</p> <p>2 A. If that's the one you're referring to, I</p> <p>3 read that, yes.</p> <p>4 Q. All right. Did you review any of Dr. Brantigan's patents?</p> <p>5 A. Yes.</p> <p>6 Q. Do you remember how many of those patents you reviewed?</p> <p>7 A. At least two.</p> <p>8 Q. And Dr. Kim's patent?</p> <p>9 A. Yes.</p> <p>10 Q. Dr. Michelson's prior art patent, the '037?</p> <p>11 A. Yes.</p> <p>12 Q. The Wagner patent, did you read that?</p> <p>13 A. Yes.</p> <p>14 Q. Steffee patent?</p> <p>15 A. Yes.</p> <p>16 Q. Tropiano patent?</p> <p>17 A. No.</p> <p>18 Q. Did you read Dr. Brantigan's deposition transcript in this matter?</p> <p>19 A. I did.</p> <p>20 Q. And when did you do that?</p> <p>21 MS. WICKRAMASEKERA: I'm sorry, the</p> <p>22 Page 14</p>	<p>1 accepted some of those terms, and that's why we're</p> <p>2 here today.</p> <p>3 Q. Right. Now, did you review the board's decision instituting the inter partes review?</p> <p>4 A. I may have, but I'm not sure I fully</p> <p>5 understand that technical detail.</p> <p>6 Q. Okay. Are you represented by counsel today?</p> <p>7 A. I am.</p> <p>8 Q. Who is that?</p> <p>9 A. Tom Martin with Martin & Ferraro and</p> <p>10 Nimalka Wickramasekera.</p> <p>11 Q. Wow, you did very well with that name. It took me many years.</p> <p>12 Who contacted you about working on this case?</p> <p>13 A. I believe Nimalka did.</p> <p>14 Q. And what, if anything, were you told about this case before you decided to work on it?</p> <p>15 A. I was told that there was a patent or</p> <p>16 intellectual property discussion, and they asked me</p> <p>17 if I would be willing to review the patents, and the</p> <p>18 IPR was raised, and offer an opinion based on my</p> <p>19 experience as a spine surgeon and, to some degree,</p> <p>20 implant developer, during the time frame that these</p> <p>21 Page 16</p>
<p>1 question is when or why?</p> <p>2 MR. MILLER: When.</p> <p>3 THE WITNESS: Last week or sometime in the</p> <p>4 last two weeks. It seems like it was a few days</p> <p>5 after he gave his deposition, but I can't recall</p> <p>6 the exact date.</p> <p>7 BY MR. MILLER:</p> <p>8 Q. Did you review it before you wrote your report in this matter?</p> <p>9 A. No.</p> <p>10 Q. So you reviewed Dr. Brantigan's deposition after you submitted your report?</p> <p>11 A. No. I wrote the majority of my report.</p> <p>12 Q. Right.</p> <p>13 A. And then I read the patent -- I read his</p> <p>14 deposition transcript, and I believe made a few</p> <p>15 comments in my declaration based on that.</p> <p>16 Q. Now, you're familiar with -- that the -- withdrawn.</p> <p>17 You know that the patent board has declared the two interferences requested -- I'm sorry, the two inter partes reviews requested by NuVasive?</p> <p>18 A. I understand that the inter parte review is</p> <p>19 an action that NuVasive takes challenging the</p> <p>20 validity of the patent, and that the board has</p> <p>21 Page 15</p>	<p>1 particular patents were filed.</p> <p>2 MS. WICKRAMASEKERA: And, Dr. Branch, I</p> <p>3 just want to caution you, to the extent that you</p> <p>4 can't recall the substance of the conversations</p> <p>5 that occurred before or after the retention, be</p> <p>6 careful about not revealing the substance of</p> <p>7 communications that we had regarding the patent</p> <p>8 and the proceeding after you retained us.</p> <p>9 BY MR. MILLER:</p> <p>10 Q. So you were contacted by Ms. Wickramasekra -- Nimalka, and then did you take some time to decide whether you wanted to work on this matter?</p> <p>11 A. I remember that we had a phone call, and</p> <p>12 that Mr. Martin and Ms. Wickramasekra, and I think</p> <p>13 several, helped me understand what the extent of this</p> <p>14 was, and I determined that I would help.</p> <p>15 Q. Did you review any of the documents before agreeing to help?</p> <p>16 A. I can't recall.</p> <p>17 Q. Have you spoken with anyone else about this matter other than Tom or Nimalka?</p> <p>18 A. No.</p> <p>19 Q. Have you spoken with any other lawyers about this matter?</p> <p>20 Page 17</p>

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.