

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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NUVASIVE, INC.  
Petitioner

v.

WARSAW ORTHOPEDIC, INC.  
Patent Owner

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Case IPR2013-00396  
Patent 8,444,696

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Before SALLY C. MEDLEY, LORA M. GREEN, and STEPHEN C. SIU,  
Administrative Patent Judges.

GREEN, *Administrative Patent Judge.*

SCHEDULING ORDER

#### A. INITIAL CONFERENCE CALL

The initial conference call is scheduled for 2:00 PM (ET) on January 16, 2014.

#### B. DUE DATES

This order sets due dates for the parties to take action after institution of the proceeding. The parties may stipulate to different dates for DUE DATES 1 through 3 (earlier or later, but no later than DUE DATE 4). A notice of the stipulation, specifically identifying the changed due dates, must be promptly filed. The parties may not stipulate to an extension of DUE DATES 4-7.

In stipulating to different times, the parties should consider the effect of the stipulation on times to object to evidence (37 C.F.R. § 42.64(b)(1)), to supplement evidence (37 C.F.R. § 42.64(b)(2)), to conduct cross-examination (37 C.F.R. § 42.53(d)(2)), and to draft papers depending on the evidence and cross-examination testimony (see Section B, below).

The parties are reminded that the Testimony Guidelines appended to the *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48772 (Aug. 14, 2012) (Appendix D), apply to this proceeding. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. 37 C.F.R. § 42.12. For example, reasonable expenses and attorneys' fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

#### 1. DUE DATE 1

The patent owner may file—

- a. response to the petition (37 C.F.R. § 42.120), and

- b. A motion to amend the patent (37 C.F.R. § 42.121).

The patent owner must file any such response or motion to amend by DUE DATE 1. If the patent owner elects not to file anything, the patent owner must arrange a conference call with the parties and the Board. The patent owner is cautioned that any arguments for patentability not raised and fully briefed in the response will be deemed waived.

## 2. DUE DATE 2

The petitioner must file any reply to the patent owner's response and opposition to the motion to amend by DUE DATE 2.

## 3. DUE DATE 3

The patent owner must file any reply to the petitioner's opposition to patent owner's motion to amend by DUE DATE 3.

## 4. DUE DATE 4

- a. The petitioner must file any motion for an observation on the cross-examination testimony of a reply witness (*see* Section C) by DUE DATE 4.

- b. Each party must file any motion to exclude evidence (37 C.F.R. § 42.64(c)) and any request for oral argument (37 C.F.R. § 42.70(a)) by DUE DATE 4.

## 5. DUE DATE 5

- a. The patent owner must file any reply to a petitioner observation on cross-examination testimony by DUE DATE 5.

b. Each party must file any opposition to a motion to exclude evidence by DUE DATE 5.

#### 6. DUE DATE 6

Each party must file any reply for a motion to exclude evidence by DUE DATE 6.

#### 7. DUE DATE 7

The oral argument (if requested by either party) is set for DUE DATE 7.

### B. CROSS-EXAMINATION

Except as the parties might otherwise agree, for each due date—

1. Cross-examination begins after any supplemental evidence is due. 37 C.F.R. § 42.53(d)(2).

2. Cross-examination ends no later than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. *Id.*

### C. MOTION FOR OBSERVATION ON CROSS-EXAMINATION

A motion for observation on cross-examination provides the petitioner with a mechanism to draw the Board's attention to relevant cross-examination testimony of a reply witness, since no further substantive paper is permitted after the reply. *See Office Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48768 (Aug. 14, 2012). The observation must be a concise statement of the relevance of precisely identified testimony to a precisely identified argument or portion of an exhibit. Each observation should not exceed a single, short paragraph. The patent owner may respond to the observation. Any response must be equally concise and specific.

DUE DATE APPENDIX

DUE DATE 1.....	February 27, 2014
Patent owner's response to the petition	
Patent owner's motion to amend the patent	
DUE DATE 2.....	May 8, 2014
Petitioner's reply to patent owner response to petition	
Petitioner's opposition to motion to amend	
DUE DATE 3.....	June 5, 2014
Patent owner's reply to petitioner opposition to motion to amend	
DUE DATE 4.....	June 26, 2014
Petitioner's motion for observation regarding cross-examination of reply witness	
Motion to exclude evidence	
Request for oral argument	
DUE DATE 5.....	July 10, 2014
Patent owner's response to observation	
Opposition to motion to exclude	
DUE DATE 6.....	July 17, 2014
Reply to opposition to motion to exclude	
DUE DATE 7.....	July 31, 2014
Oral argument (if requested)	

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