

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MEDTRONIC, INC.
Petitioner

v.

NUVASIVE, INC.
Patent Owner

Case IPR2013-00506
Patent 8,361,156

PATENT OWNER'S
MOTION TO EXCLUDE EVIDENCE

Pursuant to 37 C.F.R. § 42.62, and the Scheduling Order (Paper 10), NuVasive Inc. (“Patent Owner”), respectfully submits this Motion to Exclude certain evidence relied upon by Petitioner Medtronic, Inc. (“Petitioner”) to date, or which Petitioner may attempt to rely on it in its upcoming motions or at oral argument.

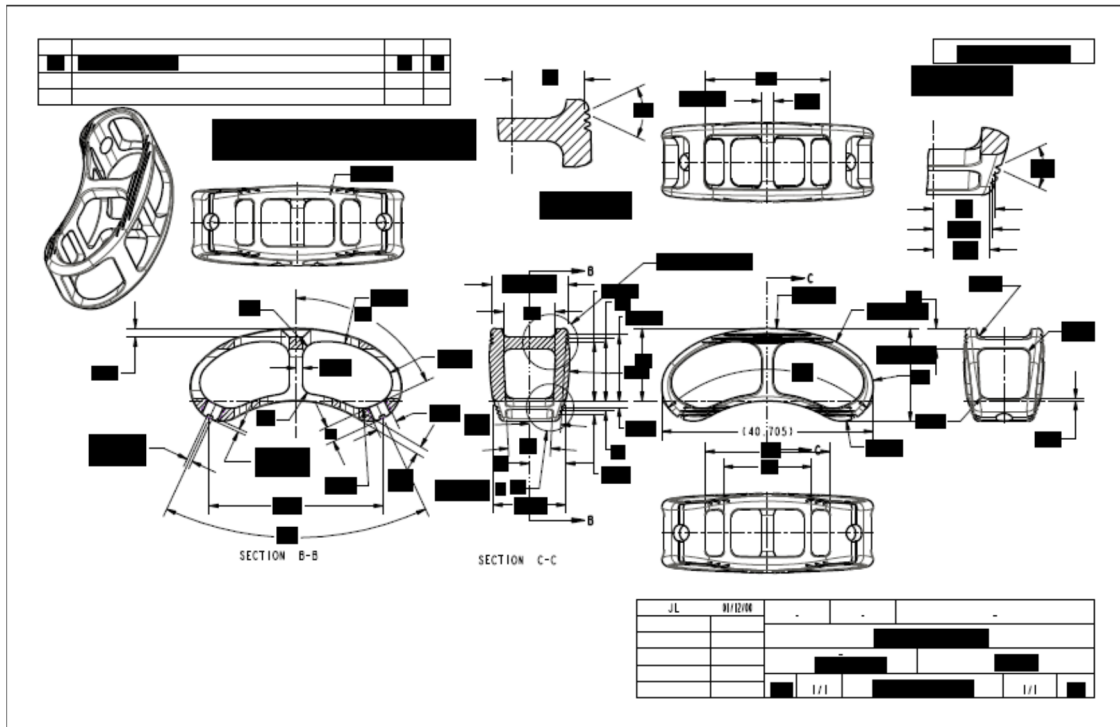
1. ARGUMENT

**a) Ex. 1116 in IPR2013-00506 and 508; Ex. 1014 in IPR2013-00507
(Declaration of Loic Josse and Appendices) Should be Excluded.**

Exhibit 1116 in IPR2013-00506 and 508 (1014 in IPR2013-00507) should be excluded under Fed. R. Evid. 901 for failure to authenticate, and Fed. R. Evid. 401-403 for its prejudicial value. “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901. Although this requirement typically sets a low bar, when the evidence clearly is not the document claimed or represented, and when the proponent refuses to produce the actual document, Rule 901 requires exclusion. *Siegal v. Am. Honda Motor Co.*, 921 F.2d 15, 17 (1st Cir. 1990) (excluding evidence that had been intentionally altered under FRE 901, stating that once altered, the evidence “was neither authentic, i.e., what appellant represented it to be, see Fed. R. Evid. 901(a), nor relevant, i.e., probative of its condition at the time of the accident, see Fed. R. Evid. 401–402”); *see also Khan v. Obama*, 655 F.3d 20, 30 (D.C. Cir. 2011) (finding that it is not

possible to assess reliability of heavily redacted documents, but exclusion was not proper in that case because that court also had access to the unredacted documents).

Appendices A-C to Ex. 1116 (Ex. 1014 in IPR2013-00507), the Declaration of Loic Josse, are heavily redacted. For example, the entirety of Appendix A (reproduced below), shows that Petitioner has concealed from Patent Owner and the Board every label and dimension on the drawing save a single dimension that Petitioner has left unredacted to serve its own purposes. The fact that Petitioner considers its dimensions to be confidential, meriting protection, undermines Petitioner's argument that proper implant dimensioning was well-known and obvious. To the contrary, Petitioner's refusal to produce unredacted versions of these documents highlights that even small changes in the dimensions of implants makes a significant difference in the use of the implant. Otherwise, there would be no reason to redact these documents, especially if as Petitioner maintains, the dimensions of implants are all known by those of skill in the art.



Ex. 1116, Appendix A

Similarly, Appendix B conceals the vast majority of the text contained therein.

Fax émis par : 8149388981 SOPHOMER DANIEK ROISSY 06/07/00 08:03 Pg: 1/0 Fax émis par : 8149388981 SOPHOMER DANIEK ROISSY 06/07/00 08:03 Pg: 2/0



Ming Liu
From: Ming Liu
Sent: Tuesday, July 04, 2000 12:30 PM
To: 'GFravZSUN@sect.com'
Cc: Lolo Josse
Subject: RE: Boomerang

Dear George,

[REDACTED]

The implants we made are of the following sizes:

Implant	W (mm)	D (mm)	H (mm)	# of parts made
mid 12	33	14	12.5	2
mid 10	33	14	10.5	2
mid 8	33	14	8.5	2
Large 14	41	18	14.5	2
Large 12	41	18	12.5	2
Large 10	41	18	10.5	2



[REDACTED]

07/04/00 23:13 TX/RX NO.3592 P.001 07/04/00 23:13 TX/RX NO.3592 P.002

Ex. 1116, Appendix B

In Appendix C, substantial information is also concealed, including hiding the entirety of the “Result” section, preventing the Patent Owner from commenting on and preventing the Board from understanding the actual results of this experimental, confidential and non-public implant.

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.