

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MEDTRONIC, INC.  
Petitioner

v.

NUVASIVE, INC.  
Patent Owner

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Case IPR2013-00506  
Patent 8,361,156

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**PETITIONER'S RESPONSE TO PATENT OWNER'S  
MOTION FOR OBSERVATION REGARDING  
CROSS-EXAMINATION OF LOIC JOSSE**

## I. Introduction

Pursuant to the Board's Order dated October 15, 2014, Petitioner Medtronic, Inc. ("Petitioner") submits the following responses to Patent Owner NuVasive, Inc.'s ("Patent Owner") Motion for Observation Regarding Cross-Examination of Loic Josse.<sup>1</sup>

## II. Responses

### A. Response to Observation #1

In Ex. 2038, at 19:25 to 20:11 and 31:15 to 32: 6, Mr. Josse testified about U.S. Patent No. 6,156,037 as follows:

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25 Q. Wonderful. In that section you

Page 20

2 actually state that the "above mentioned

3 U.S. patent number 5,727,661 issued

4 January 30, 1998 to Michaelson, the

5 disclosure of which is incorporated herein

6 by reference to an extent which may be

7 needed to understand the device and method

8 of the present invention."

9 That is written in your '037

10 patent. Correct?

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<sup>1</sup> Patent Owner includes in the exhibit list preceding the Motion Exhibit Nos. 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, each of which have been expunged by the Order dated October 15, 2014. *See* IPR2013-00506, Paper 37, at 5 (PTAB October 15, 2014).

11 A. Correct.

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15 A. So, in the claim, the first  
16 claim, this is described as implants can  
17 have elongated length. As I describe here  
18 in my declaration, length of implant is  
19 dependent on the approach of the implant  
20 as well as the anatomy of the patient,  
21 anatomy of the vertebra where the device  
22 or implant is going to be implanted as  
23 described in the claim number 1 in the  
24 disc space in the case of this Boomerang  
25 cages.

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2 Yes, the cage can be  
3 40 millimeters long or even longer if  
4 necessary or if directed by the anatomy of  
5 the patient or by the approach used to  
6 implant.

This testimony is relevant to the reply at pages 3-5 regarding implant length.

B. Response to Observation #2

In Ex. 2038, at 37:19 to 38: 4, Mr. Josse testified as follows:

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19 Q. On this page, in the left side  
20 of the page, kind of two thirds of the way  
21 down, it identifies standard cages.

22 Correct? Do you see that?

23 A. Correct. I see that.

24 Q. And it lists the length of those  
25 standard cages as 30 millimeters,

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2 35 millimeters or 40 millimeters.

3 Correct?

4 A. Correct.

This testimony is relevant to Mr. Josse's testimony at ¶ 4 of the Josse Declaration where he states that "Medtronic has commercialized interbody spinal fusion implants having a length of at least 40 mm." Ex. 1116, at ¶ 4.

C. Response to Observation #3

In Ex. 2038, at 48:19 to 49:12, Mr. Josse testified as follows:

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19 Q. And this is a draft of the  
20 marketing materials. Correct?

21 [objection omitted]

22 [objection omitted]

23 A. No. Actually, I believe this is  
24 the final version as we describe at the  
25 last page where you can find the Medtronic

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2 reference and date of release.

3 Q. But the cover page says "draft  
4 copy." Correct?

5 A. Correct. But I believe it is a  
6 typo. I don't know for which reason they  
7 mention "draft copy, internal use only."

8 Q. I didn't understand your last  
9 response. Can you say it again, please?

10 A. I said I don't know why the  
11 mention "Draft copy, for internal use  
12 only" remained on the final version.

This testimony is relevant to Ex. 2038, at 43:6-22, because it places that testimony in the proper context, and to Mr. Josse's testimony at ¶ 4 of the Josse Declaration where he indicates that the Appendix D to his declaration was publicly available.

D. Response to Observation #4

In Ex. 2038, at 45:22 to 46:10, Mr. Josse testified as follows:

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22 Q. In paragraph 4 you state that  
23 you are aware of Medtronic commercializing  
24 interbody fusion implants having a length  
25 of at least 40 millimeters. Correct?

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2 A. That is correct, in Europe.

3 Yes, that is correct.

4 Q. The only implant you identify in  
5 paragraph 4 being commercialized is the  
6 Butterfly implant. Correct?

7 MR. SCHWARTZ: Objection to  
8 form.

9 A. That is correct, with the  
10 Boomerang implant mentioned before.

This testimony is relevant to Mr. Josse's testimony at ¶ 4 of the Josse Declaration where he indicates that the Butterfly implant described in Appendix D to his declaration was commercialized.

E. Response to Observation #5

In Ex. 2038, at 71:19 to 76:3, Mr. Josse testifies about Appendix B to his declaration. *See* Ex. 2038, at 71:19-22 (“Now, if you turn back to Appendix B, which is the email exchange between Ming Liu and gfrey2sun@aol.com? Yes.”).

This is relevant to Ex. 2038, at 73:2-17, because it shows that Mr. Josse was testifying to the dimension D as being the width of the implant described in

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