

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN  
DISTRICT OF VIRGINIA NORFOLK DIVISION

*Biedermann Tech GmbH & Co. KG,*

*v.*

*K2M, Inc. and K2M Group Holdings, Inc.*

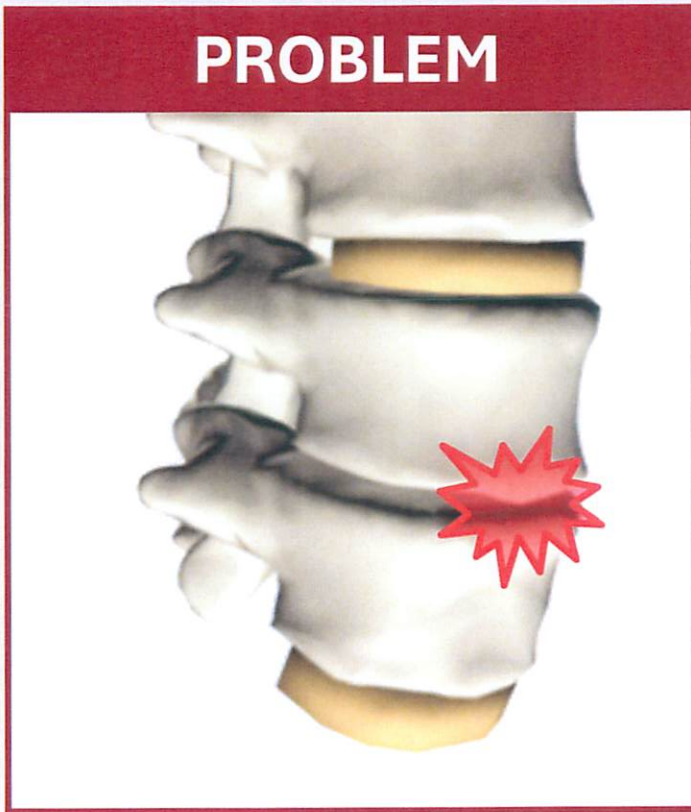
# **Biedermann's Opposition to K2M's *Daubert* Motion Exclude Damages Opinions of Julie Davis**

October 14, 2021

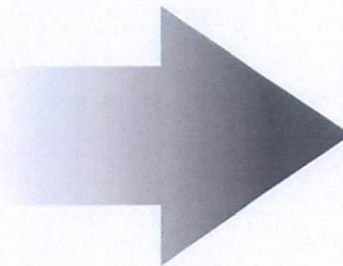


# Spinal Fixation Technology

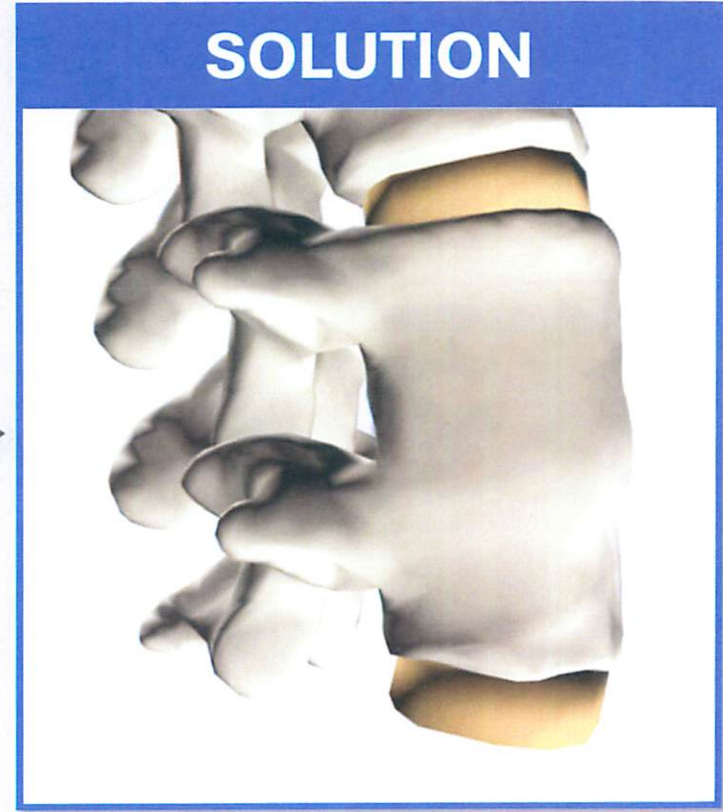
**PROBLEM**



**Disc injured or diseased**

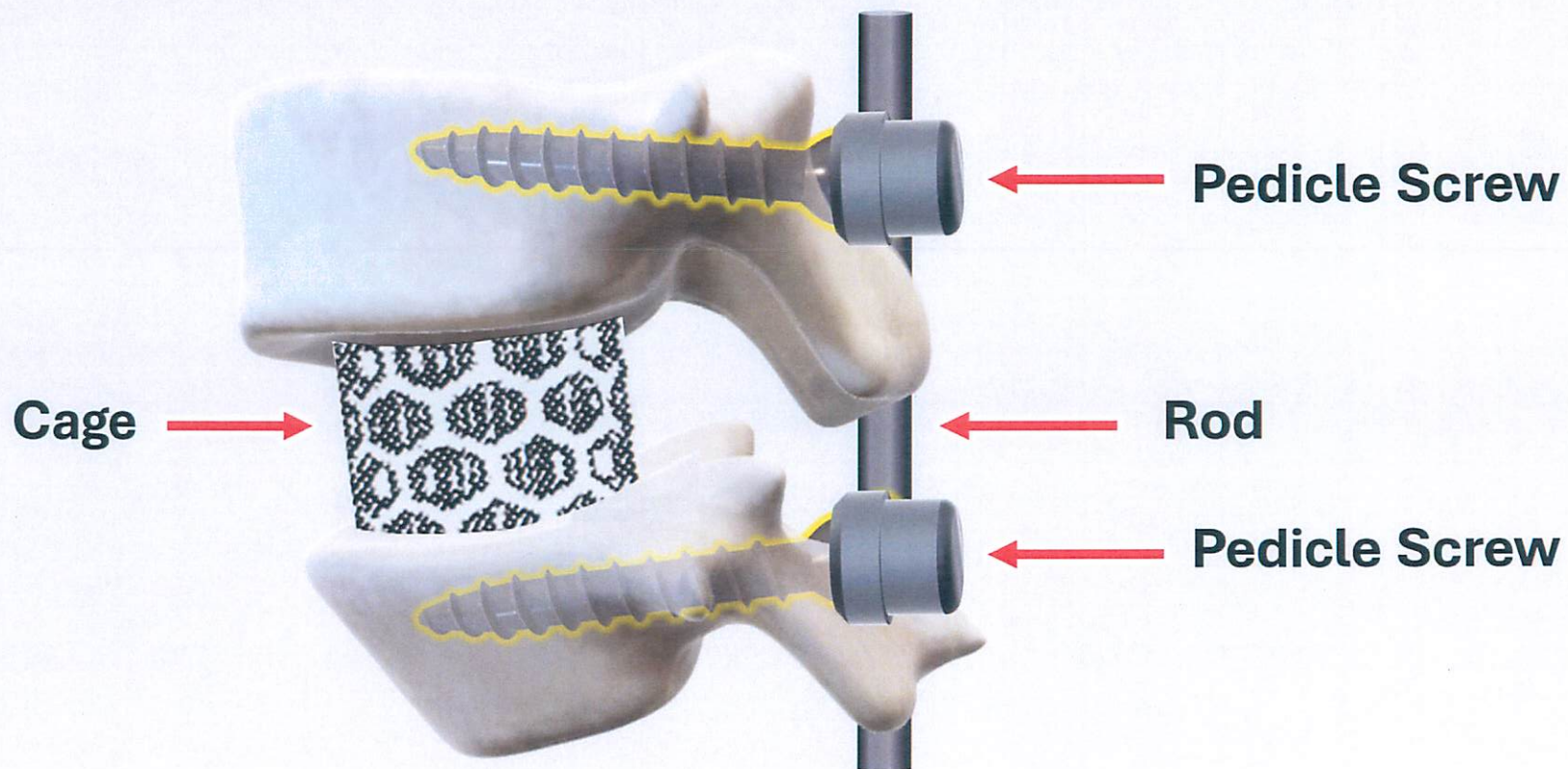


**SOLUTION**



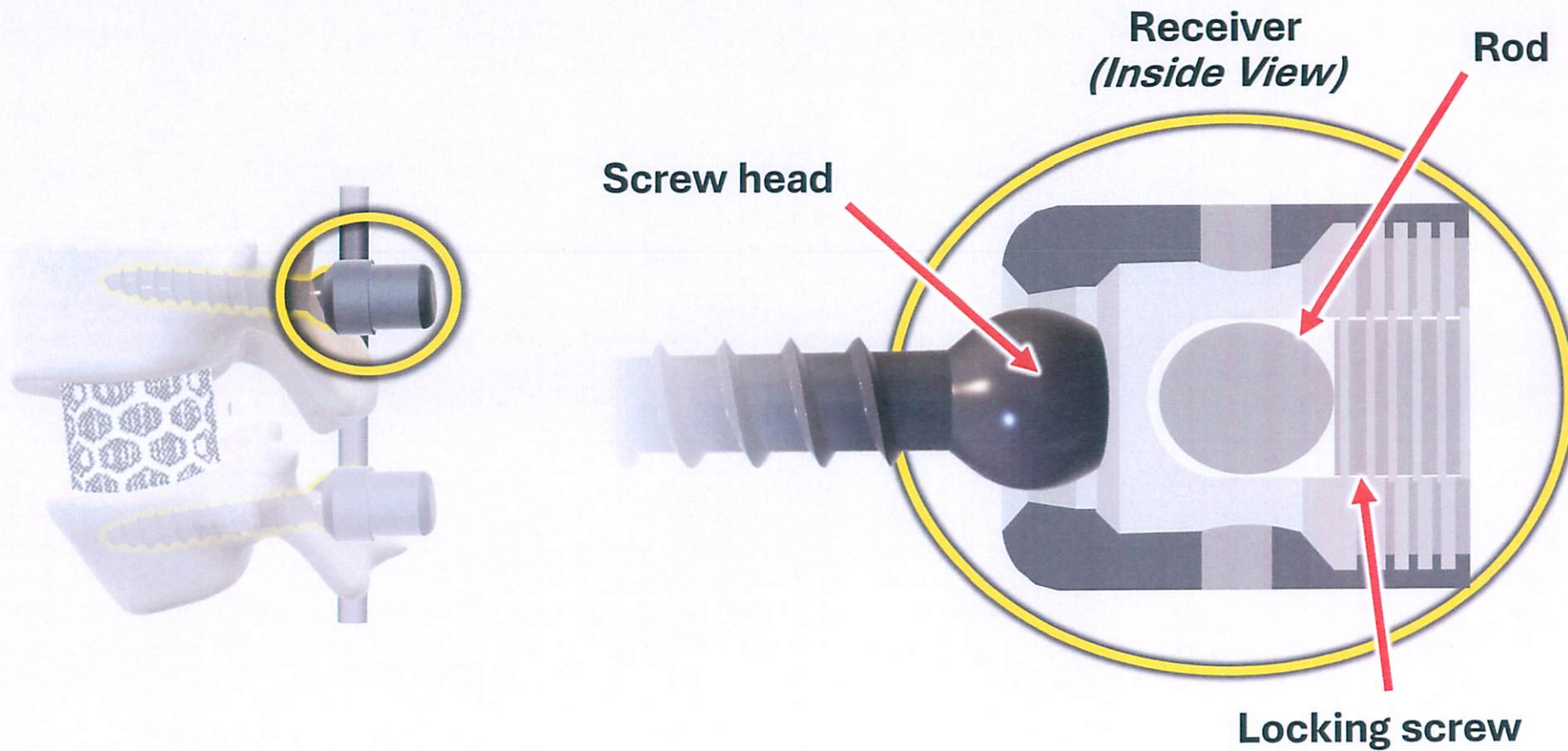
**Fusion**

# Spinal Fixation Technology



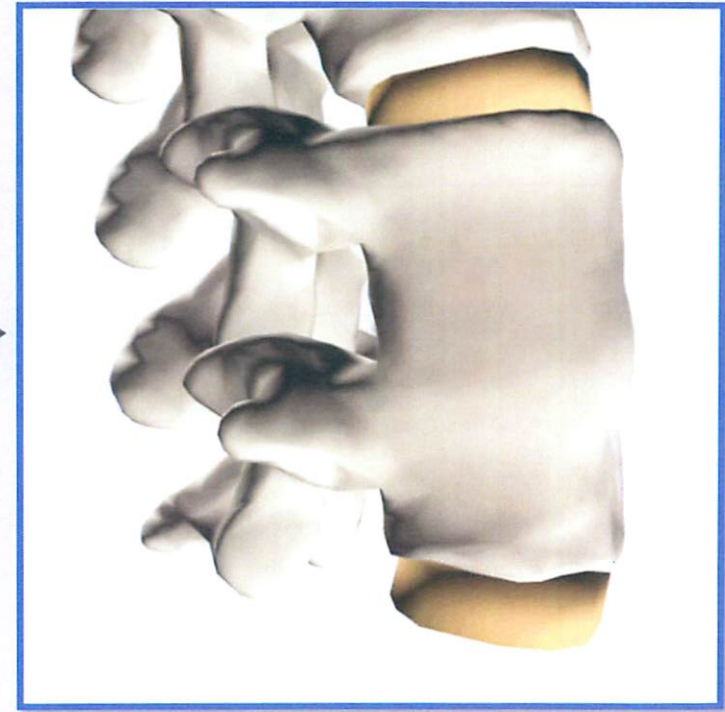
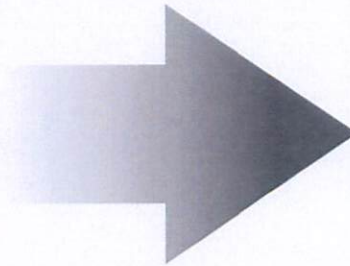
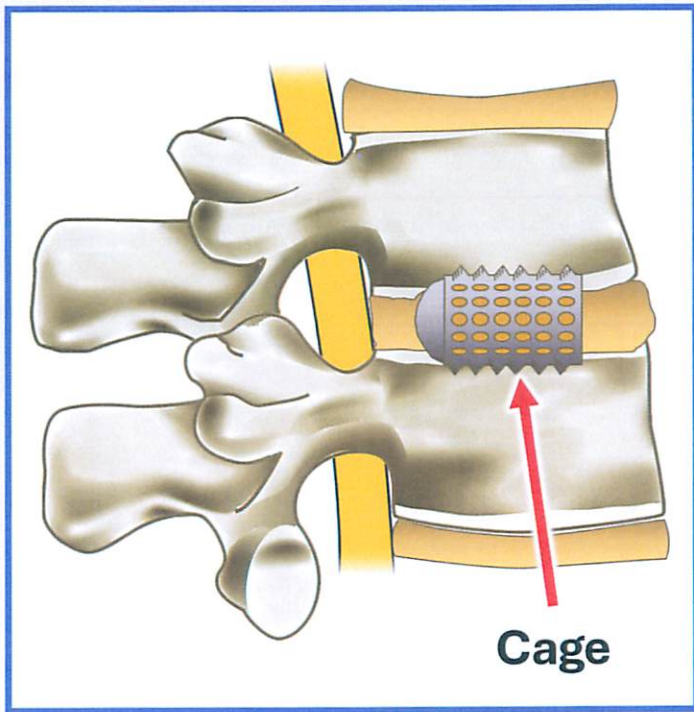


# Spinal Fixation Technology





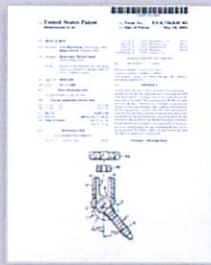
# Spinal Fixation Technology



# Patents At Issue

## 6 Patents for Screw Fixation

### The Favored-Angle Patents



'820 Patent



'093 Patent

### '784 Patent



### '600 Patent



### '399 Patent



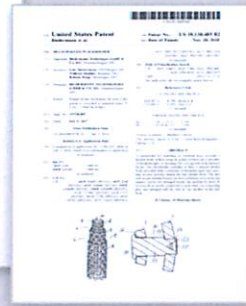
### '121 Patent



## 2 Patents for Interbody Fixation



'595 Patent



'485 Patent



## Damages

### **Biedermann is entitled to:**

- » a reasonable royalty
- » derived from infringed patented features
- » at market value

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

*35 U.S.C. § 284*

# Comparable Licenses



## Comparable Licenses for Reasonable Royalty Analysis

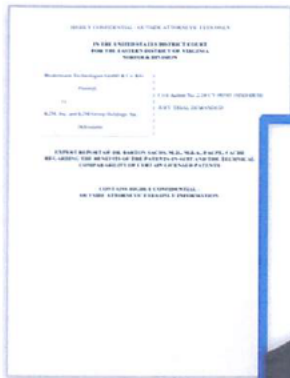
### **Comparable Licenses:**

Technical / economic similarity can form the basis for apportionment

*See Bio-Rad Laboratories, Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1377 (Fed. Cir. 2020)

# Ms. Davis's Analysis

## 1. Dr. Sachs

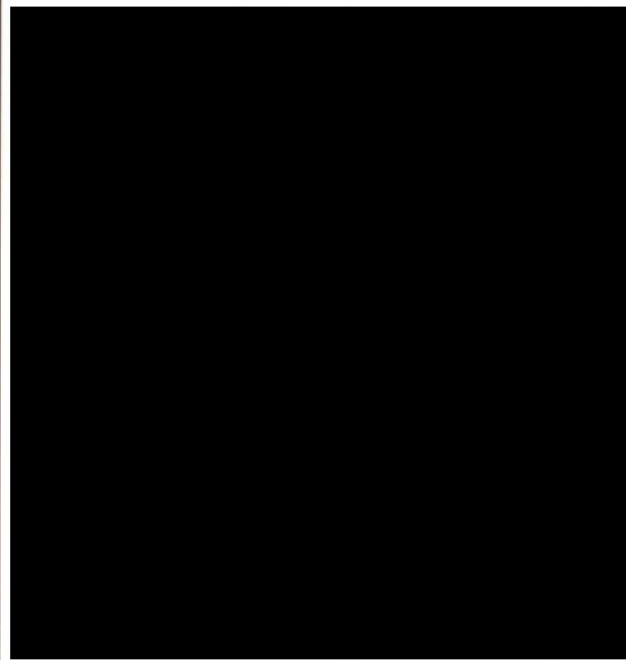


Barton Sachs

### Dr. Sachs

- Expert Report
- Deposition

## 2. Historical Licenses

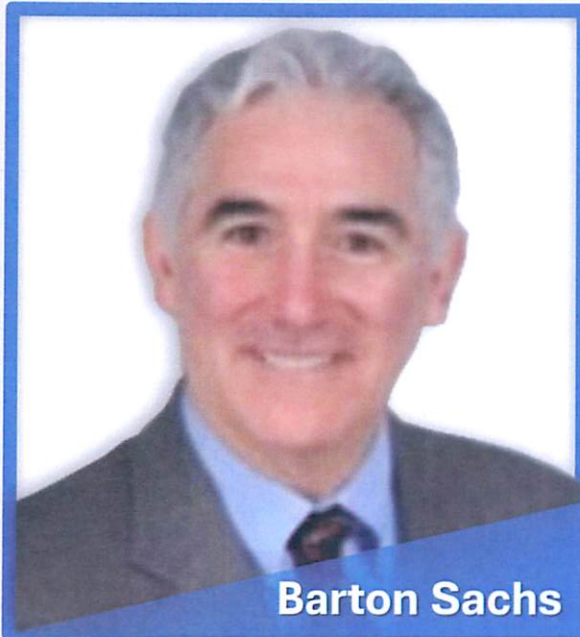


## 3. Biedermann's Licensing Approach Supported by Historical Licenses





## Dr. Barton Sachs



### **Dr. Barton Sachs**

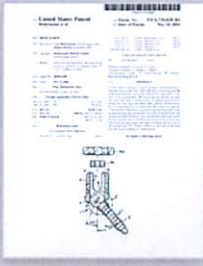
Orthopaedic Surgeon

- » Bachelor of Arts in Biology in 1973 from
- » Harvard University
- » Doctorate of Medicine in 1977 from State University of New York
- » Over 40 years' experience
- » Experience in running medical devices companies

# Dr. Barton Sachs

## Evaluates Technology of Each Asserted Patent

### The Favored-Angle Patents



'820 Patent

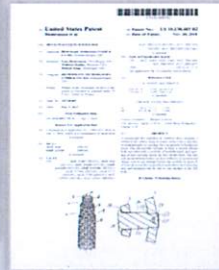


'093 Patent

### Interbody Patents



'595 Patent



'485 Patent

### '784 Patent



### '600 Patent



### '399 Patent



### '121 Patent



## Finds **All** Asserted Patents Technically Comparable to Historically Licensed Technology





## Dr. Barton Sachs's Comparability Analysis Is Unchallenged

### Stryker Technology Comparable



### NuVasive Technology Comparable



## Dr. Sachs's Comparability Analysis Is Unchallenged

### Alphatec Technology Comparable



### Allez Technology Comparable





## Dr. Sachs's Comparability Analysis Is Unchallenged

Q. And your conclusion, isn't it the case that you concluded in each instance that the licensed patents, [REDACTED], were comparably -- were comparable, were technically comparable to each of the patents in the suit; is that right?

A. They were technically comparable [REDACTED]  
[REDACTED]

Sachs Dep. Tr. at 212:1-8

# Ms. Davis Relies On Dr. Sachs

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION  
Case No. 2:18-cv-00585-MSD-DEM

BIEDERMANN TECHNOLOGIES GmbH & CO. KG,  
Plaintiff,  
v.  
K2M, INC. and K2M GROUP HOLDINGS, INC.,  
Defendants.

EXPERT REPORT AND DISCLOSURE OF  
JULIE L. DAVIS

Submitted January 17, 2020

HIGHLY CONFIDENTIAL - OUTSIDE ATTORNEYS' EYES ONLY

The hypothetical negotiators would recognize the following from the agreements involving **Alphatec** and **Allez**:

- [REDACTED] which I understand from **Dr. Sachs** offers similar benefits to the patents-in-suit.<sup>204</sup>

- The license covers the [REDACTED]  
[REDACTED] I understand from **Dr. Sachs** that [REDACTED]  
licensed to **Stryker** offer similar benefits to the patents-in-suit.<sup>165</sup>

- The license covers [REDACTED] I understand  
from **Dr. Sachs** that [REDACTED] licensed to **NuVasive** offer similar benefits to the  
patents-in-suit.<sup>182</sup>

Davis Opening Report at 43, 35, 38



## Comparable Licenses for Reasonable Royalty Analysis

### Comparable Licenses:

- Technically Comparable
- Economically Comparable

## Ms. Davis Deems Historical Licenses Economically Comparable

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NOFOLK DIVISION  
Case No. 2:18-cv-00585-MSD-DEM

BIEDERMANN TECHNOLOGIES GmbH & CO. KG,  
Plaintiff,  
v.  
K2M, INC. and K2M GROUP HOLDINGS, INC.,  
Defendants.

EXPERT REPORT AND DISCLOSURE OF  
JULIE L. DAVIS

Submitted January 17, 2020

HIGHLY CONFIDENTIAL - OUTSIDE ATTORNEYS' EYES ONLY

### Ms. Davis Considers:

- » Parties
- » Collaborative or Non-Collaborative
- » Exclusive or Nonexclusive License
- » Competitive Considerations
- » Structure of Licenses
- » Territory Covered
- » Technology

Davis Report at 28-43; Appx B

- » **Concludes that the Allez, Alphatec, Stryker and NuVasive licenses are most comparable**



## Ms. Davis Confirms Economic Value of Patented Features Highlighted In K2M's Marketing

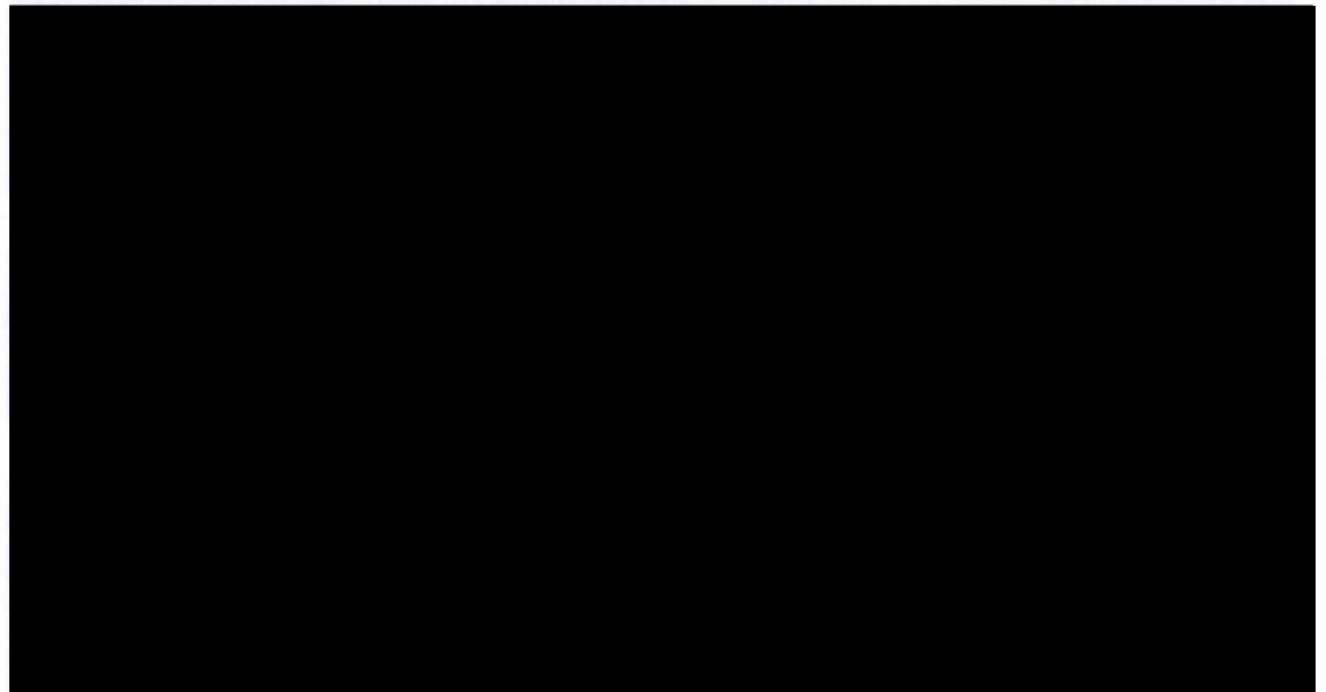
UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION  
Case No. 2:18-cv-00585-MSD-DEM

BIEDERMANN TECHNOLOGIES GmbH & CO. KG,  
Plaintiff,  
v.  
K2M, INC. and K2M GROUP HOLDINGS, INC.,  
Defendants.

EXPERT REPORT AND DISCLOSURE OF  
JULIE L. DAVIS

Submitted January 17, 2020

HIGHLY CONFIDENTIAL - OUTSIDE ATTORNEYS' EYES ONLY



## Ms. Davis's Analysis Of Biedermann's Policy

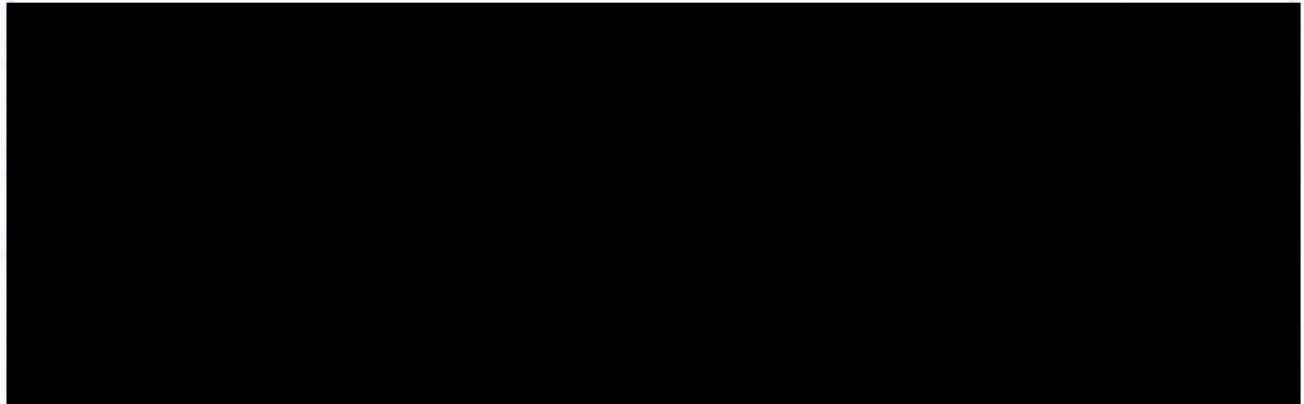
UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION  
Case No. 2:18-cv-00585-MSD-DEM

BIEDERMANN TECHNOLOGIES GmbH & CO. KG,  
Plaintiff,  
v.  
K2M, INC. and K2M GROUP HOLDINGS, INC.,  
Defendants.

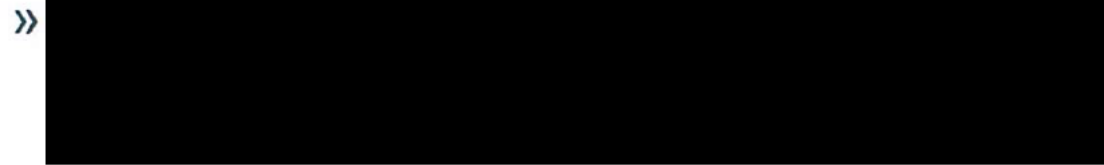
EXPERT REPORT AND DISCLOSURE OF  
JULIE L. DAVIS

Submitted January 17, 2020

HIGHLY CONFIDENTIAL - OUTSIDE ATTORNEYS' EYES ONLY

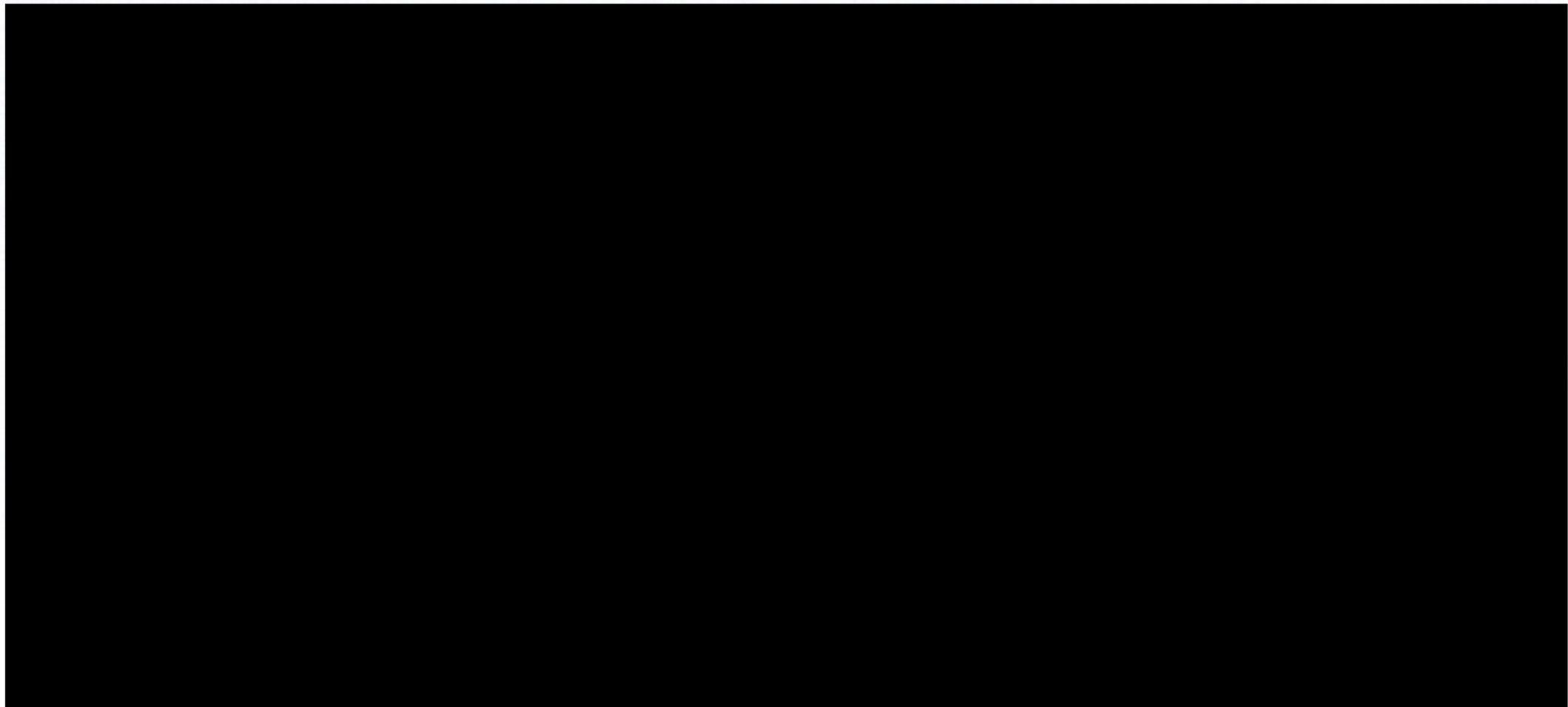


### » Biedermann licenses:





## What The Licensing Market Shows



## What The Licensing Market Shows

License	
NuVasive	
Stryker	
Alphatec	
Allez	
DePuy	

Davis Opening Report at Appendix B



## Comparable Licenses for Reasonable Royalty Analysis

### Comparable Licenses:

- Technically Comparable
- Economically Comparable

# **Ms. Davis's Analysis Properly Apportions**



## Comparable Licenses Can Satisfy Apportionment

“As Bio-Rad correctly points out, there is no blanket rule of quantitative apportionment in every comparable license case. In *Elbit Systems Land & C4I Ltd. v. Hughes Network Systems, LLC*, for example, we accepted ‘built in apportionment’ for a comparable license agreement. 927 F.3d at 1301 (internal quotations omitted).”

*Bio-Rad Laboratories, Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1376 (Fed. Cir. 2020)

“[Damages expert] explained that his methodology involved looking at comparable license agreements between competitors for similar technologies and assessing whether the importance of that technology to the particular license was similar to the hypothetical negotiation...Thus, under [Damages expert’s] reasoning, no adjustment of the 15% royalty rate in the comparable licenses was required. His analysis could reasonably be found to incorporate the required apportionment. Our case law does not require more.”

*Bio-Rad Laboratories, Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1377 (Fed. Cir. 2020)

“Built-in apportionment effectively assumes that the negotiators of a comparable license settled on a royalty rate and royalty base combination embodying the value of the asserted patent... For built-in apportionment to apply the license must be ‘sufficiently comparable’ in that ‘principles of apportionment were effectively baked into’ the purportedly comparable license.”

*Omega Patents, LLC v. CalAmp Corp.*, 2020-1793, 2021 WL 4168153, at \*10 (Fed. Cir. Sept. 14, 2021)

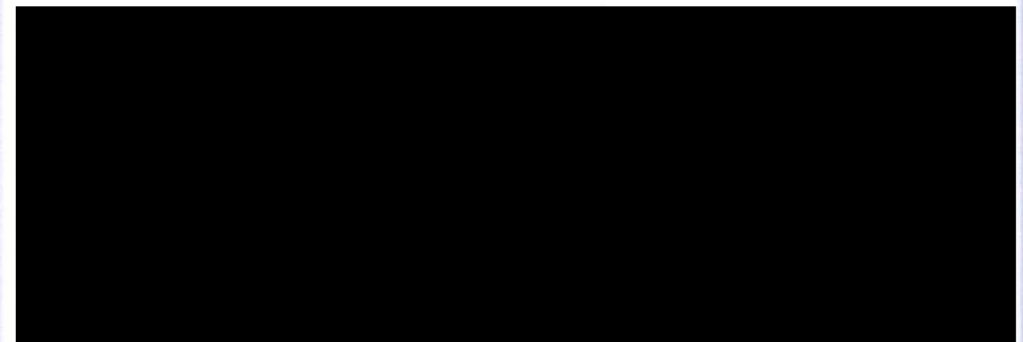
## “Baked In Apportionment” Allez/Alphatec Agreements

The [REDACTED] feature is apportioned:

- » Dr. Sachs deems technology comparable to asserted patents
- » Ms. Davis concludes economic comparability



## “Baked In Apportionment” Stryker Agreement

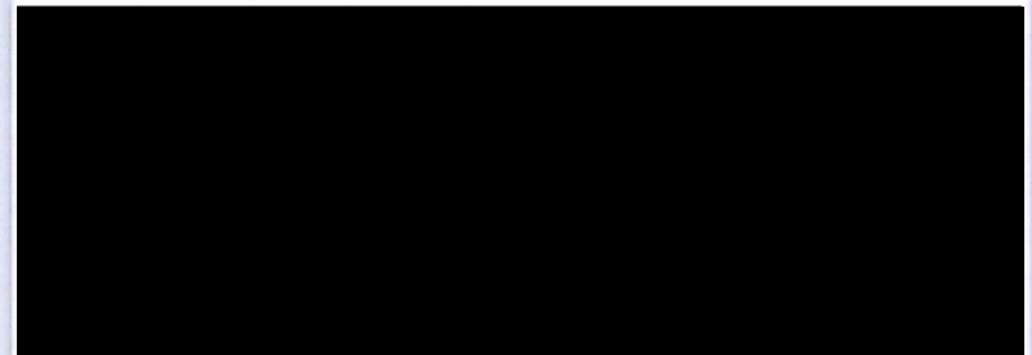


Sachs Opening Report at ¶ 91

The [REDACTED] feature is apportioned:

- » Dr. Sachs deems technology comparable to asserted patents
- » Ms. Davis concludes economic comparability

## “Baked In Apportionment” NuVasive Agreement



Sachs Opening Report at ¶ 115

The [REDACTED] features are apportioned:

- » Dr. Sachs deems technology comparable to asserted patents
- » Ms. Davis concludes economic comparability

## Apportionment Is Satisfied

### Comparable Licenses:

- Technically Comparable
- Economically Comparable
- Satisfy Built-In Apportionment**



# K2M's "Aggregation" Argument is Wrong

# Ms. Davis Concludes that Each Patent Valued at [REDACTED]

Based on the above considerations, it is my opinion that the hypothetical negotiators would agree to a royalty for the patents-in-suit in an amount ranging from [REDACTED] of K2M's net sales of the accused products. [REDACTED] [REDACTED] this royalty rate would apply regardless of which of the asserted patents are ultimately found to be valid and infringed.

Davis Opening Report at 67

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION  
Case No. 2:18-cv-00585-MSD-E

BIEDERMANN TECHNOLOGIES GmbH & CO. KG,  
Plaintiff,  
v.  
K2M, INC. and K2M GROUP HOLDINGS, INC.,  
Defendants.

EXPERT REPORT AND DISCLOSURE OF  
JULIE L. DAVIS

Submitted January 17, 2020

HIGHLY CONFIDENTIAL - OUTSIDE ATTORNEYS' EYES ONLY

## No Prohibition on Use of Same Rate for Each Asserted Patent

### *Virnetx, Inc. v. Cisco System, Inc.,*

“After determining the royalty base, Weinstein applied a 1% royalty rate, based on six allegedly comparable licenses, as well as his understanding that VirnetX had a ‘policy’ of licensing its patents for 1–2%.”

*Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1330 (Fed. Cir. 2014)  
(affirming Virnetx comparable license theory and built-in apportionment for four patents)



## K2M: “Ms. Davis Applies ██████ To Product Regardless Of Specific Patent Infringement”

# WRONG!

Patent	Expiration Date
6,736,820	11/9/2021
8,123,784	3/11/2024
8,257,399	9/19/2029
8,828,060	9/20/2026
8,945,194	11/9/2021
9,566,093	11/9/2021
9,572,600	8/13/2030
9,597,121	1/25/2033
9,814,595	12/22/2026
9,895,173	11/27/2022
10,058,353	11/9/2021
10,130,485	12/22/2026

Davis Report at 61

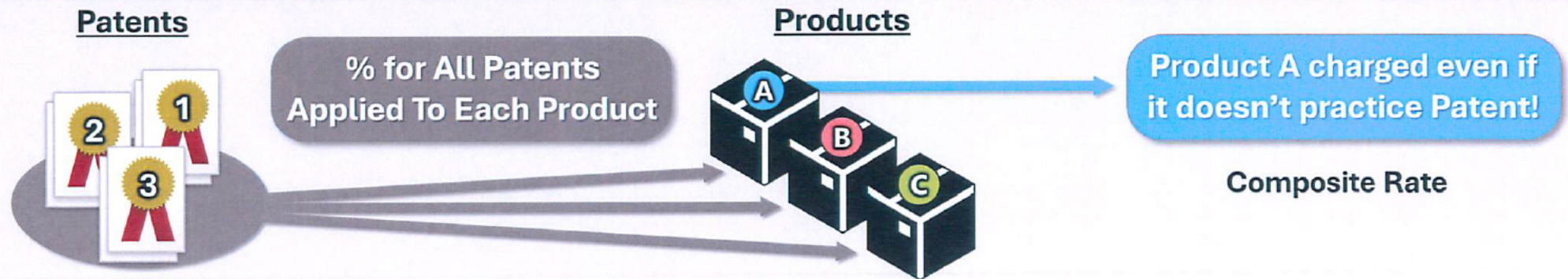
Q. ... Let -- let's say of the 12 patents-in-suit, if only the flat thread patents are upheld, so it's patents on one feature, then your opinion would be that the rate to be applied for Everest would be ██████, correct?

A. My opinion is that the rate would remain the same; however, the damages period would need to be adjusted to reflect the later issue dates of those patents.

Davis Deposition at 57:8-16

- » if Everest only infringes '600 Patent, then ██████ only for life of '600 patent
- » if Yukon only infringes '820 Patent, then ██████ only for life of '820 patent
- » etc.

## No Composite Rate Issue



Specifically, Defendants assert that Mr. Hampton's damages calculation “enormously overstates the footprint of each claimed invention in the marketplace, as it forces the Defendants to pay a royalty for patents that the Defendants' products are not even accused of infringing.” (Id. at 20).

*MiiCs & Partners, Inc. v. Funai Electric Co., Ltd.*, CV 14-804-RGA, 2017 WL 6268072, at \*5 (D. Del. Dec. 7, 2017)

» Ms. Davis applies the [REDACTED] to a product only to the extent covered by an infringed patent, which is endorsed by MiiCS. *See id.* at \*6 n. 4



## K2M's Own Briefing Belies Position

Ms. Davis's unreliable methodology even conflicts with her recognition that, if a product does not infringe a patent, it would not be covered by a royalty (Davis Dep. 26:8-14); "if a product does not embody a patented technology, [] it would not carry a royalty" (*id.* 27:5-7; *see also id.* 28:22-29:2, 29:18-23). In all cases, Ms. Davis's improper methodology charges K2M the *same* royalty so long as at least one patent is found infringed by any K2M product.

K2M Motion To Exclude unreliable Testimony of Julie Davis at 11

» **There is nothing wrong with attributing "same" royalty**



## Ms. Davis's Analysis in Accord with Federal Circuit Law

» **The reasonable royalty rate is predicated on prior comparable licenses that apportion technology**

**Allez and Alphatec [REDACTED]; Stryker [REDACTED]; NuVasive [REDACTED];**



**Technically Comparability**



**Economically Comparability**



**Baked In Apportionment**

# Inclusion of Rods in Royalty Base

## Components In Functional Unit In Royalty Base

### *Rite-Hite*

“The rule has been extended to allow inclusion of physically separate unpatented components normally sold with the patented components. *See, e.g., Paper Converting*, 745 F.2d at 23, 223 USPQ at 599. However, in such cases, the unpatented and patented components together were considered to be components of a single assembly or parts of a complete machine, or they together constituted a functional unit. *See, e.g., Velo-Bind, Inc. v. Minnesota Mining & Mfg. Co.*, 647 F.2d 965, 211 USPQ 926 (9th Cir.), *cert. denied*, 454 U.S. 1093, 102 S.Ct. 658, 70 L.Ed.2d 631 (1981).”

*Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1550 (Fed. Cir. 1995)

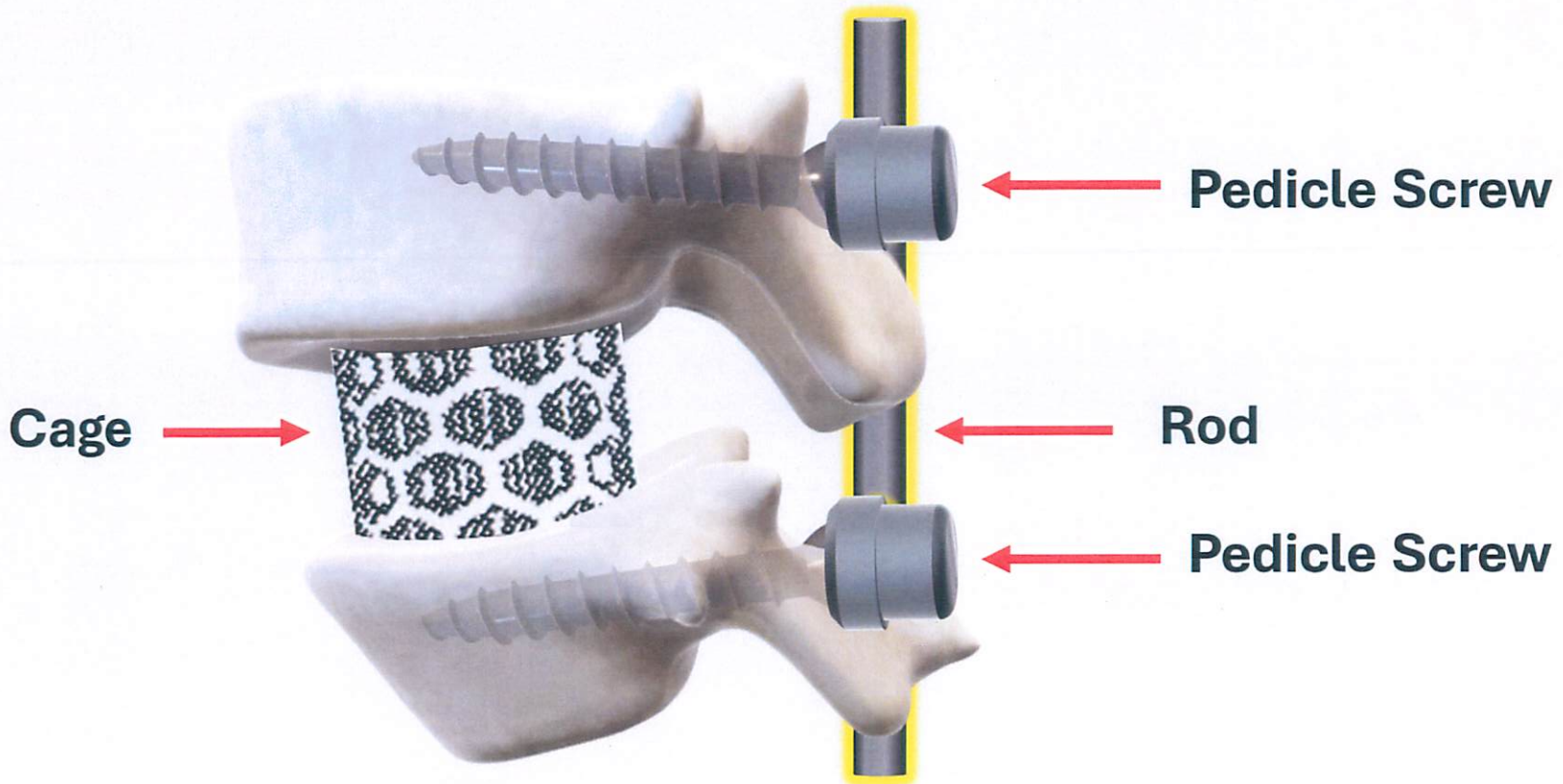


## K2M Sells Accused Products with Rods

**Dieselma Testimony (K2M's Marketing 30(b)(6) Witness)**



## The Accused Systems Include Rods



## Comparable Licenses Include Rods



# The Asserted Patents Are Directed To The System (including Rods)

## '399 Patent



(57)

### ABSTRACT

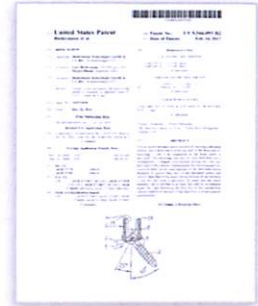
An anchoring device for anchoring a rod in a bone or a vertebra and for use with at least two rods having a different diameter is provided. The anchoring device includes a shaft and a head for connection to one of said rods. The head is

'399 Patent at Abstract

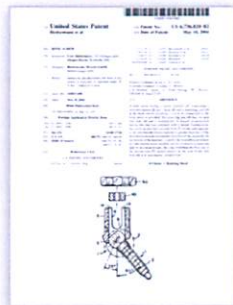
1. A bone fixation assembly comprising:  
a coupling element **for coupling a rod** to the bone fixation assembly, the coupling element having an upper end and a lower end and defining a first bore coaxial with

'093 Patent, Claim 1

## '093 Patent



## '820 Patent



1. A bone screw apparatus comprising:  
a bone screw having a screw member a threaded section, a head end and a head at the head end;

a receiving part at the head end for receiving a rod to be connected to the bone screw, wherein the receiving part has an open first bore with an axis and a substantially U-shaped cross-section having two legs provided

'820 Patent, Claim 1

26. A bone anchoring device comprising:  
an anchoring element comprising a shaft for anchoring to a bone and a head;  
a receiving part comprising a seat for receiving the head and a **U-shaped recess forming two legs defining a channel for receiving a rod** to be connected to the bone anchoring device, at least one of the two legs having a recess extending therein;

'600 Patent, Claim 26

## '600 Patent

