

**The Case of the Very Bad Vendor:
Trade Secrets & NDA Tips**

October 20, 2020

Christy Lea
Knobbe Martens

Association of Corporate Counsel San Diego

CardiAQ Valve Technologies, Inc.

- Founded in 2007

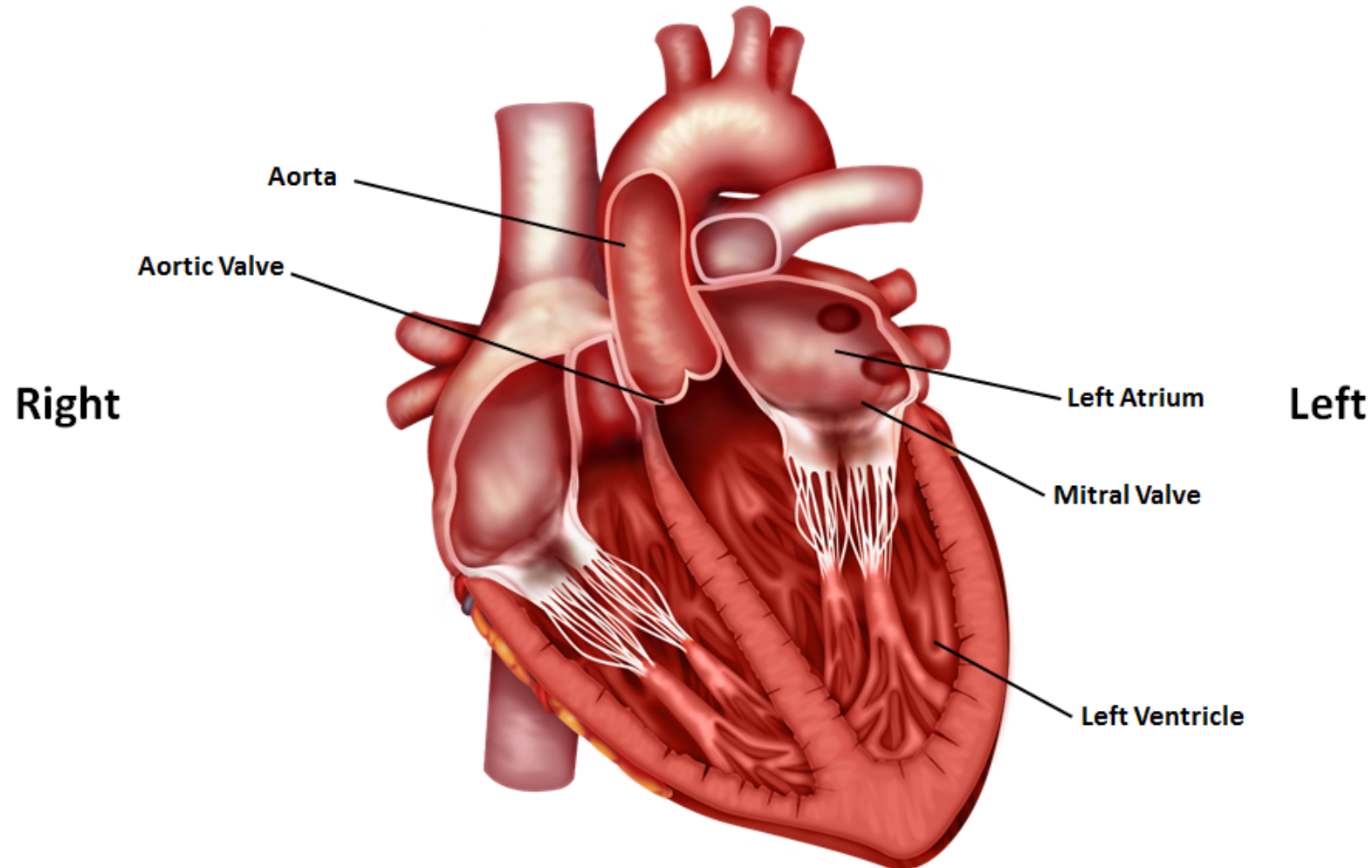


Arshad Quadri
CardiAQ Surgeon

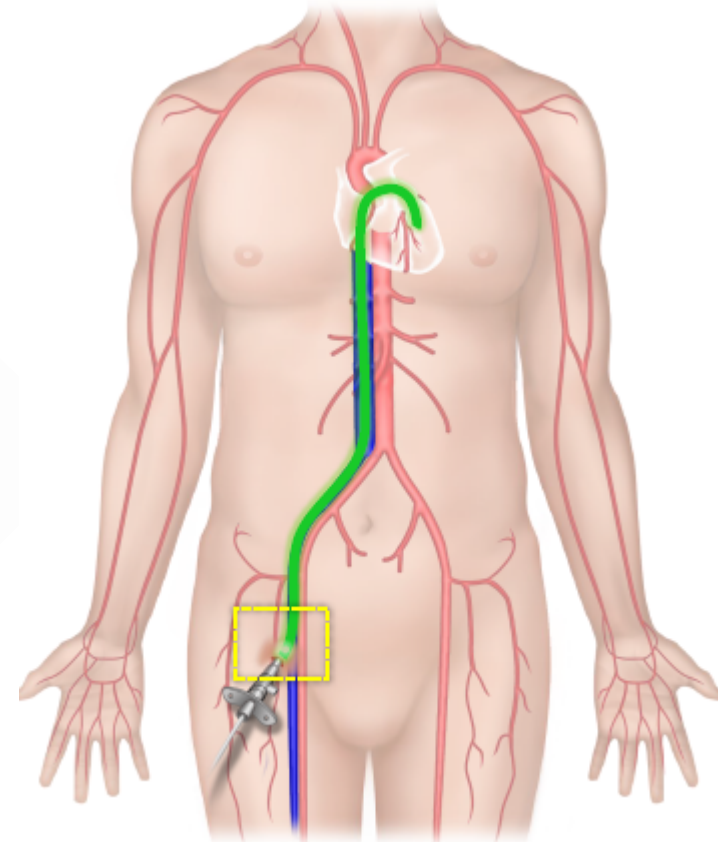
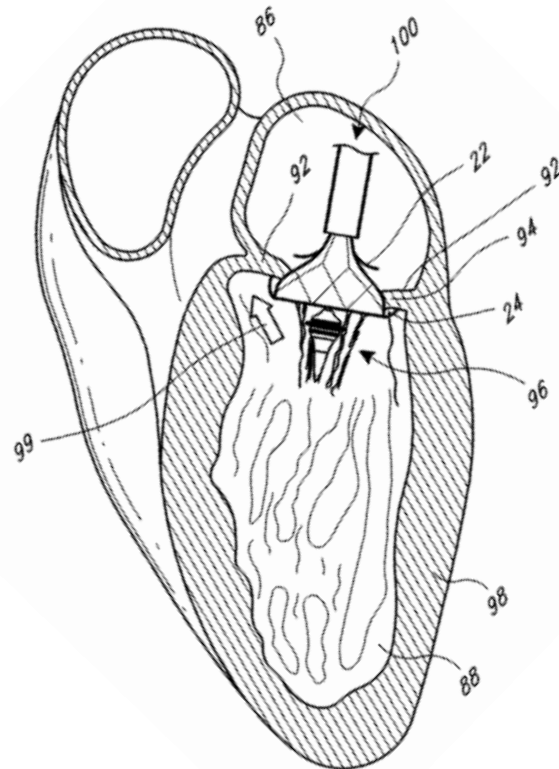


Brent Ratz
Medical Device
Engineer

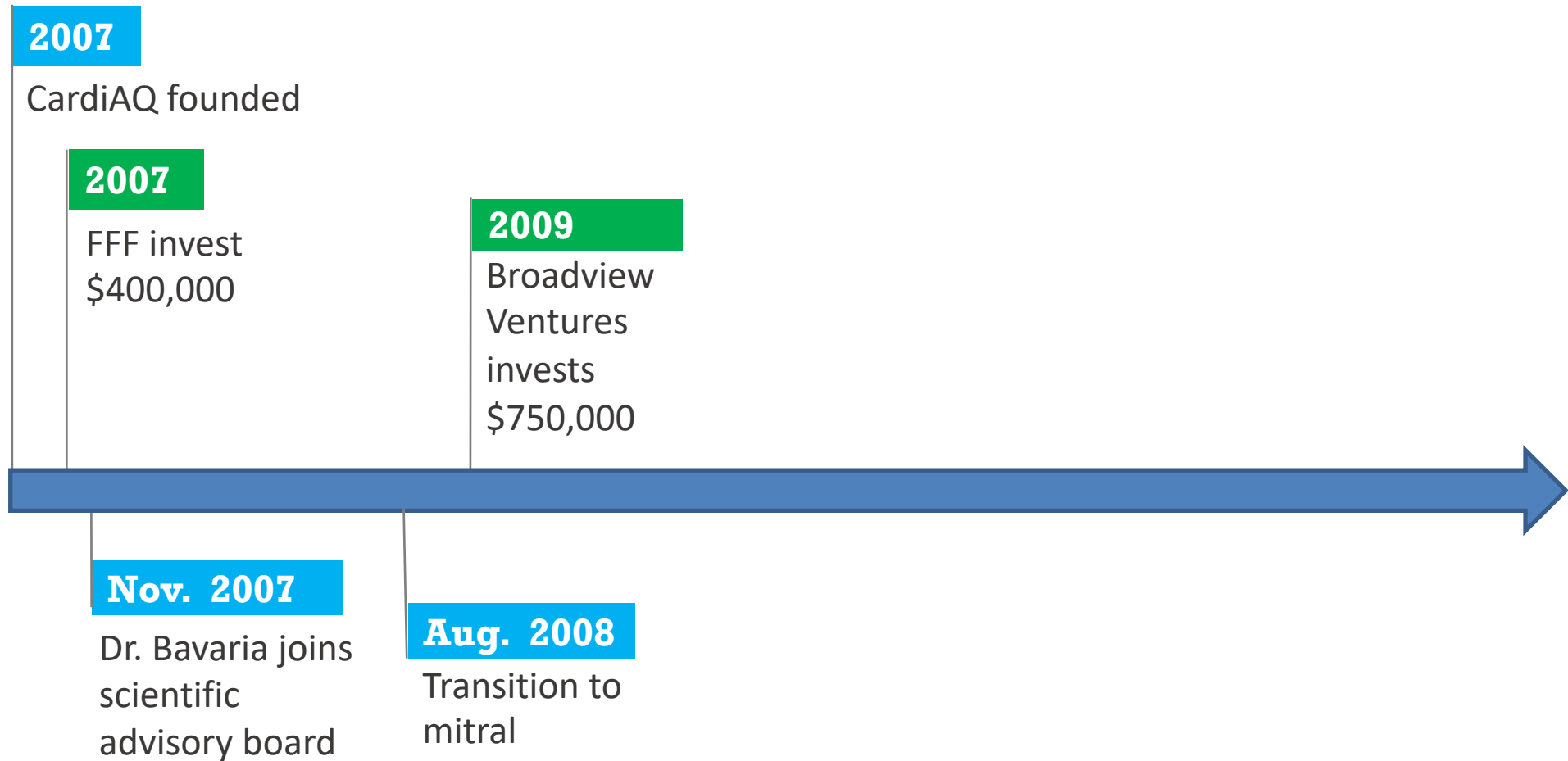
The Heart & Mitral Regurgitation



Transcatheter Mitral Valve Implant (TMVI)



CardiAQ Early Stage Milestones



CardiAQ Hires Neovasc

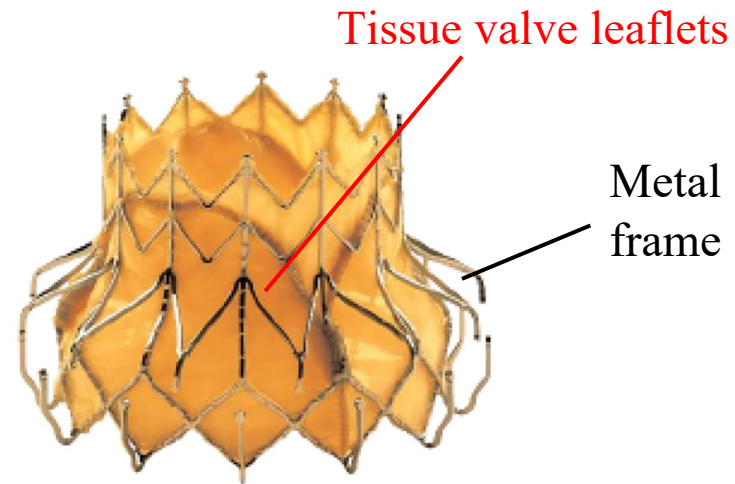
Jun. 2009

Sign NDA
with Neovasc

**Neovasc assembles TMVI
prototypes for CardiAQ**

Sep. 2009

First animal in
vivo



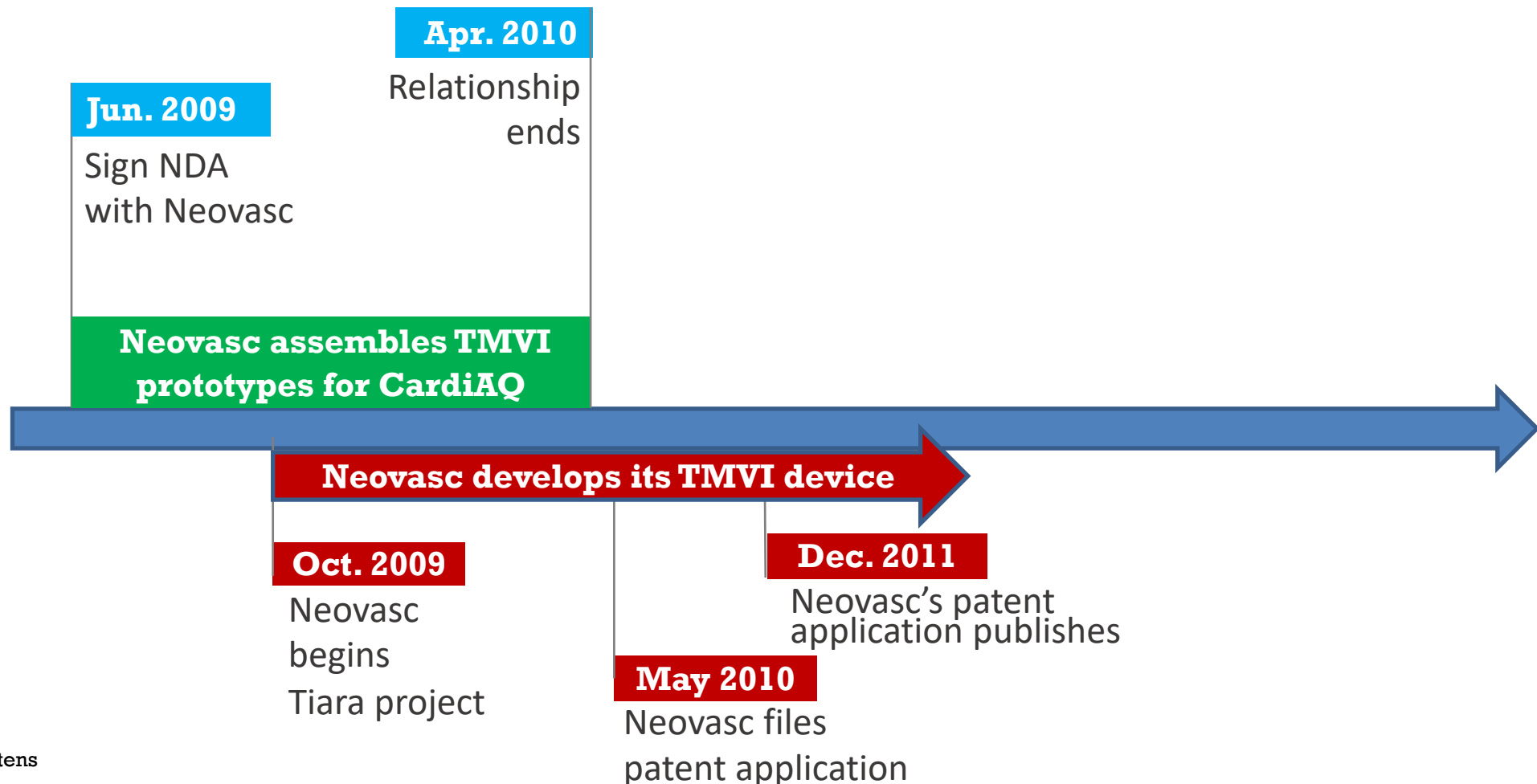
NDA Terms

- “Confidential Information” - information “not generally known to the public,” including trade secrets
- Recipient cannot “use the Confidential Information for its own benefit or for the benefit of any third party”
- Use limited to “evaluating the proposed business relationship”
- Independent development allowed, but cannot use other party’s Confidential Information
- “No less care to safeguard” clause

What the NDA Did Not Include

- Non-compete
- Segregated teams
- Assignment
- Further consulting agreement
- Joint development
- Forum
- Arbitration

Neovasc Starts Secret Program



Neovasc Emails ;-)



Neovasc CEO instructs lead engineer to start in-house mitral program, but don't tell CardiAQ:

“when appropriate we may need to disclose to [CardiAQ] that we are working on something, but let's cross that bridge when we come to it.”

Neovasc's Patent Publishes

Priority Data:
5 May 2010

Inventors:
Randy Lane
Colin A. Nyuli

(12) INTERNATIONAL APPLICATION PUBLISHED UNDER THE PATENT COOPERATION TREATY (PCT)

(19) World Intellectual Property Organization
International Bureau

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10 November 2011 (10.11.2011)

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PCT/CA2011/000662

(22) International Filing Date:
4 May 2011 (04.05.2011)

(25) Filing Language: English

(26) Publication Language: English

(30) Priority Data:
61/331,799 5 May 2010 (05.05.2010) US
61/393,860 15 October 2010 (15.10.2010) US
61/414,879 17 November 2010 (17.11.2010) US

(71) Applicant (for all designated States except US): NEOVASC INC. [CA/CA]; 13700 Mayfield Place, Suite 2135, Richmond, British Columbia V6V 2E4 (CA).

(72) Inventors; and
(75) Inventors/Applicants (for US only): LANE, Randy Matthew [CA/CA]; 20557 Grade Crescent, Langley,

British Columbia V3A 4K1 (CA). NYULI, Colin A. [CA/CA]; 16-784 Thurlow Street, Vancouver, British Columbia V6E 1V9 (CA).

(74) Agent: KINGWELL, Brian G.; Smart & Biggar, Suite 2200, 650 West Georgia Street, Vancouver, British Columbia V6B 4N8 (CA).

(81) Designated States (unless otherwise indicated, for every kind of national protection available): AE, AG, AL, AM, AO, AT, AU, AZ, BA, BB, BG, BH, BR, BW, BY, BZ, CA, CH, CL, CN, CO, CR, CU, CZ, DE, DK, DM, DO, DZ, EC, EE, EG, ES, FI, GB, GD, GE, GH, GM, GT, HN, HR, HU, ID, IL, IN, IS, JP, KE, KG, KM, KN, KP, KR, KZ, LA, LC, LK, LR, LS, LT, LU, LY, MA, MD, ME, MG, MK, MN, MW, MX, MY, MZ, NA, NG, NI, NO, NZ, OM, PE, PG, PH, PL, PT, RO, RS, RU, SC, SD, SE, SG, SK, SL, SM, ST, SV, SY, TH, TJ, TM, TN, TR, TT, TZ, UA, UG, US, UZ, VC, VN, ZA, ZM, ZW.

(84) Designated States (unless otherwise indicated, for every kind of regional protection available): ARIPO (BW, GH, GM, KE, LR, LS, MW, MZ, NA, SD, SL, SZ, TZ, UG,

Publication Date:
10 November 2011

(54) Title: TRANSCATHETER MITRAL VALVE PROSTHESIS

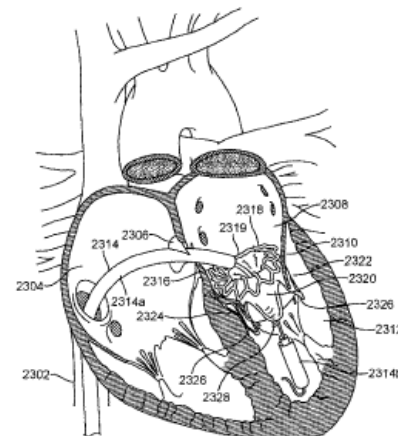
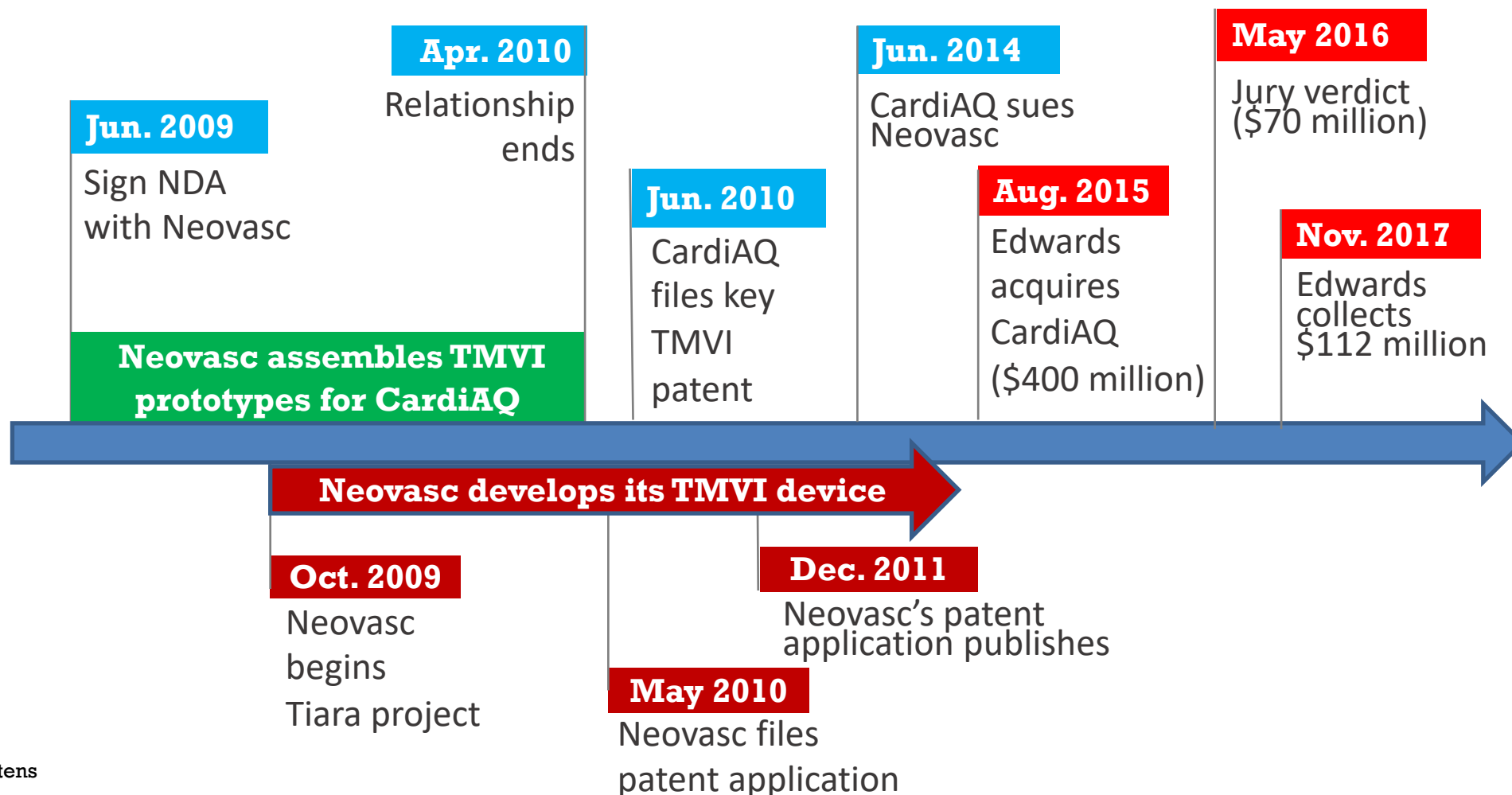


FIG. 23G

Title:
TRANSCATHETER MITRAL
VALVE PROSTHESIS

(57) Abstract: A prosthetic anchor having an atrial skirt ventricular skirt. The prosthesis of prosthetic valve leaflets is free end. The first end is connected to the free end is opposite the first valve has an open configuration to allow the prosthetic valve leaflets to another to allow antegrade flow in closed configuration in which prosthetic valve leaflets engage to prevent retrograde blood flow therepast. The anchor has a collapsed configuration for delivery to the heart and an expanded configuration for anchoring the prosthetic cardiac valve to a patient's heart.

CardiAQ Sues & Gets Acquired



Misappropriation of Trade Secrets

- CardiAQ must prove that
 - CardiAQ's information was a trade secret
 - Information not generally known
 - That has independent economic value or would have value to a competitor
 - CardiAQ continues to use the trade secret
 - CardiAQ took reasonable steps to preserve the secrecy of its information
 - Neovasc used the trade secret through improper means

CardiAQ Witnesses Tell Its Great American Success Story



Arshad Quadri
Founder &
Heart Surgeon



Brent Ratz
Founder &
Engineer



Rob Michiels
Investor & CEO



Richard Hillstead, Ph.D.
Technical Expert



Michael Wagner
Damages Expert



Dr. Joseph Bavaria
Chair of CardiAQ Scientific
Advisory Board
& Medical Expert

Neovasc's Public Filings

Specialized Skill & Knowledge

“The Tiara program has benefited enormously from this pool of experience and talent that has evolved as we have worked with our partners.

We have been able to move the product development forward rapidly with minimal cost from the flexibility we have to draw on our staff and then return them to revenue generating activities when they are not working on the Tiara project.”

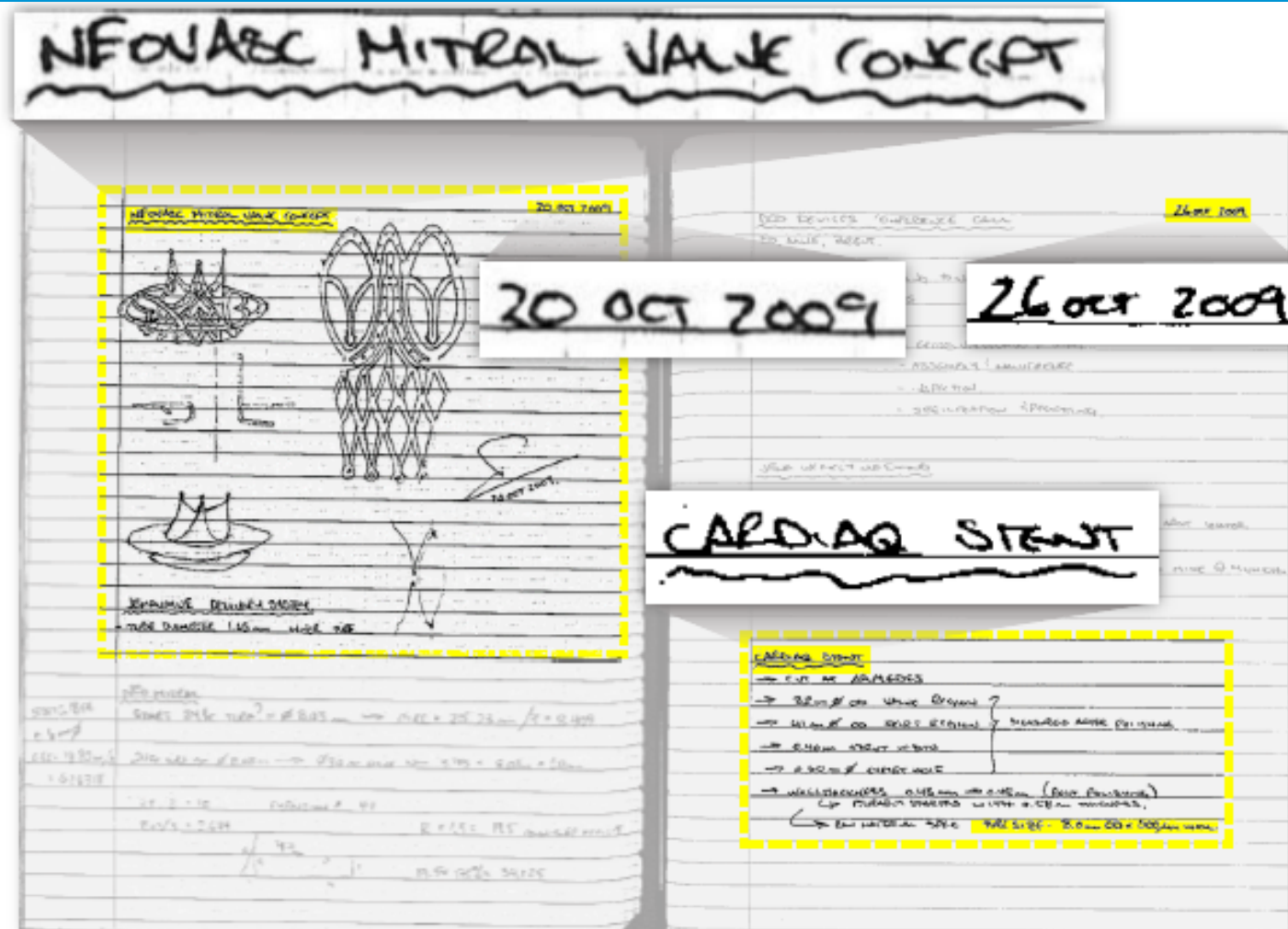


NEOVASC INC.

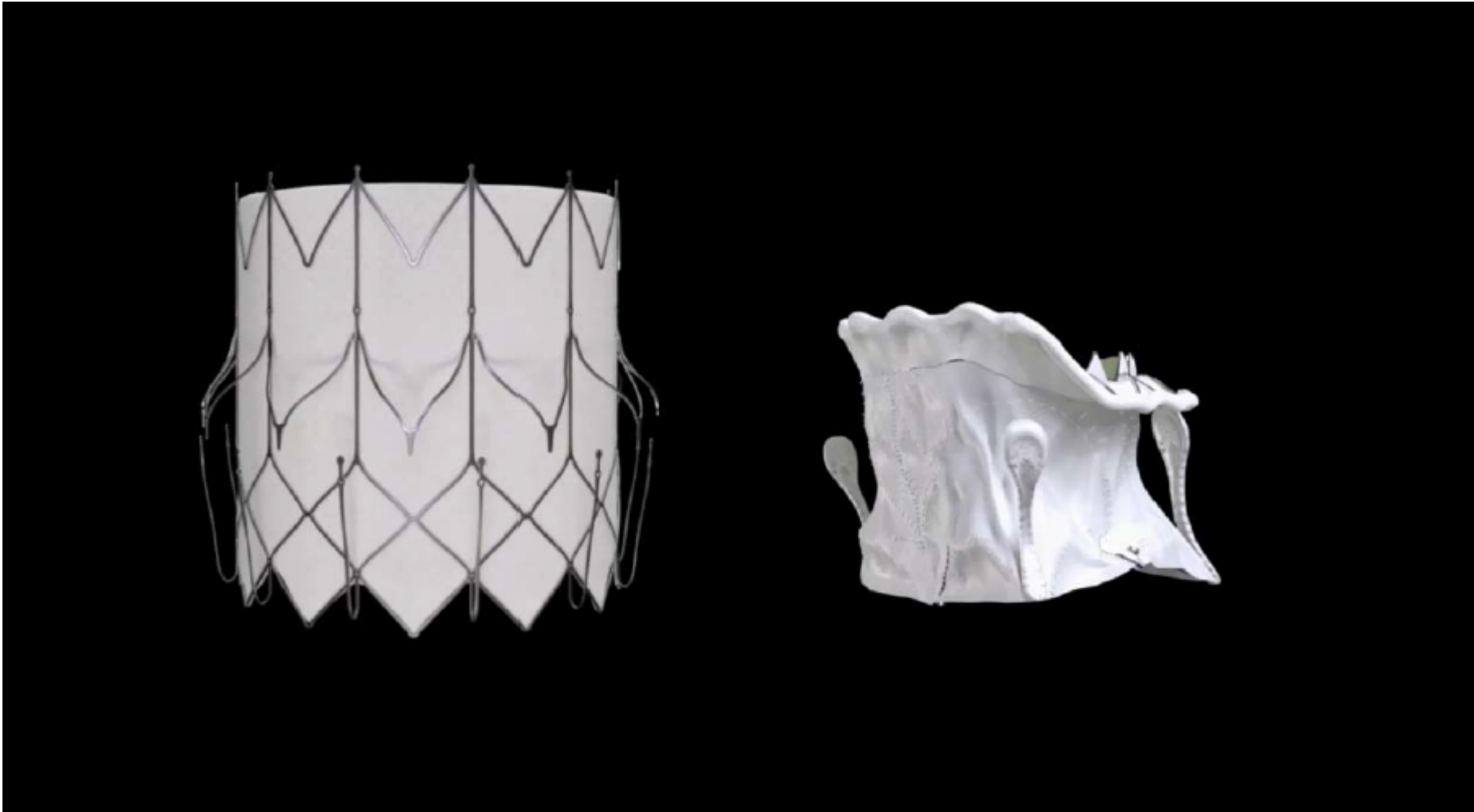
ANNUAL INFORMATION FORM
FOR THE FISCAL YEAR ENDED DECEMBER 31, 2012

October 1, 2013

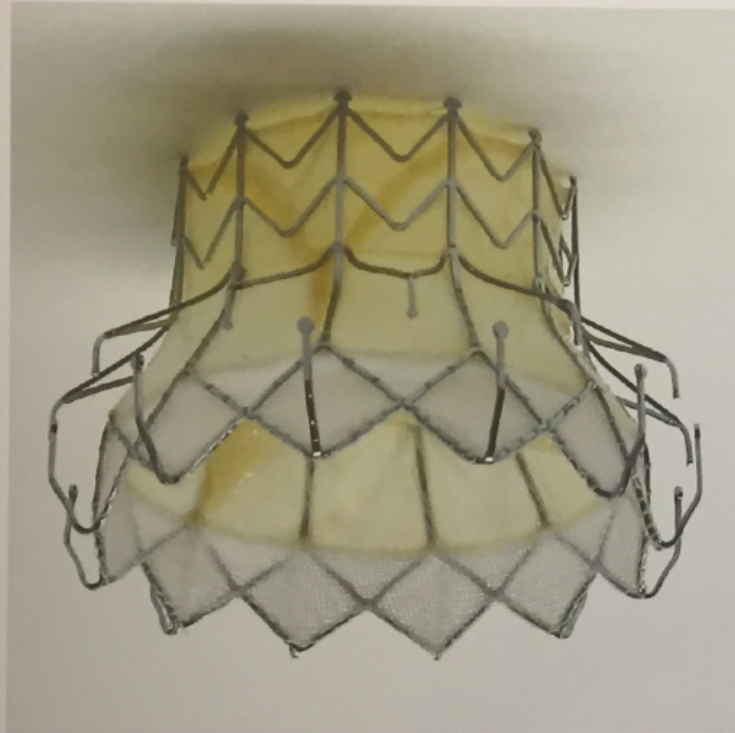
The Lab Notebook



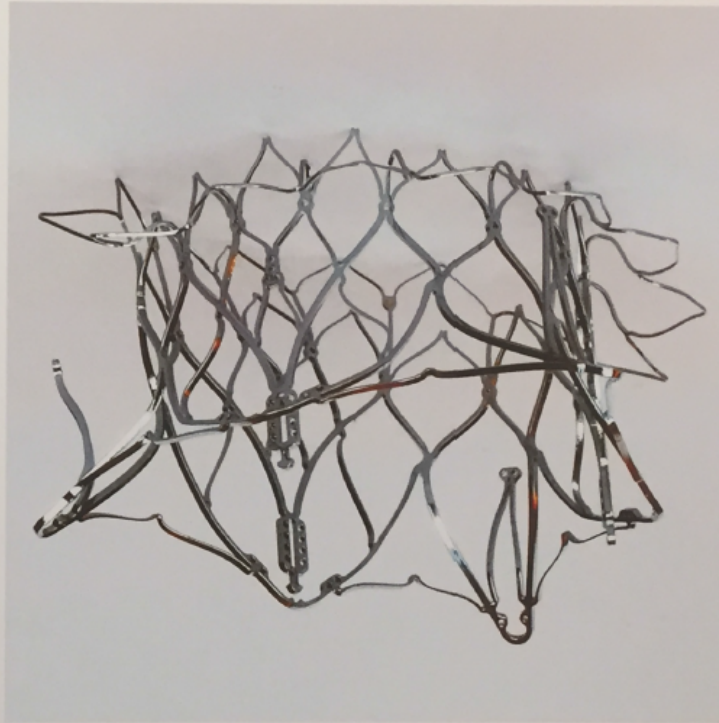
CardiAQ vs. Tiara (Neovasc's version)



CardiAQ v. Tiara (CardiAQ's version)

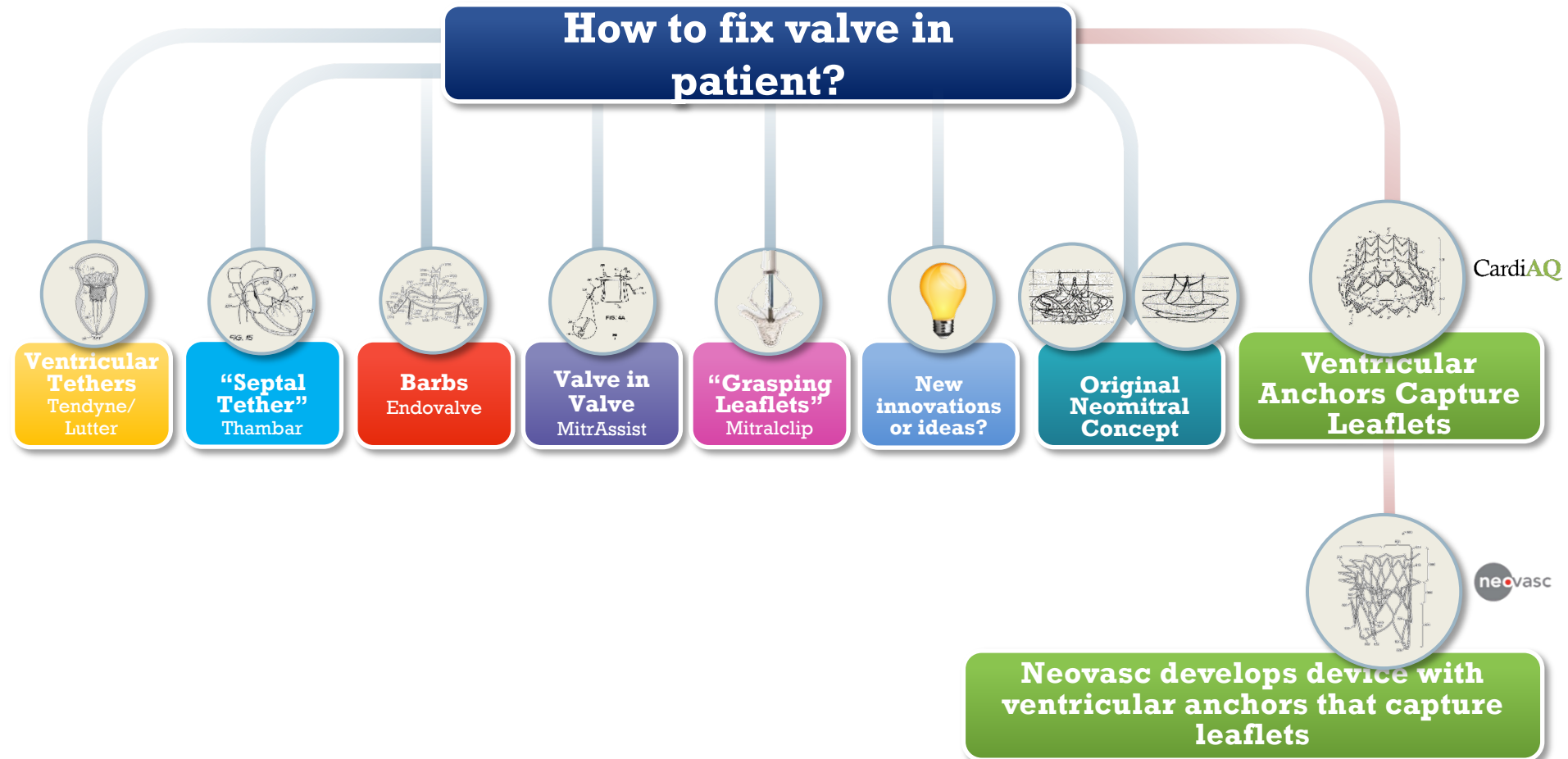


CardiAQ Rev E3



Neovasc Tiara

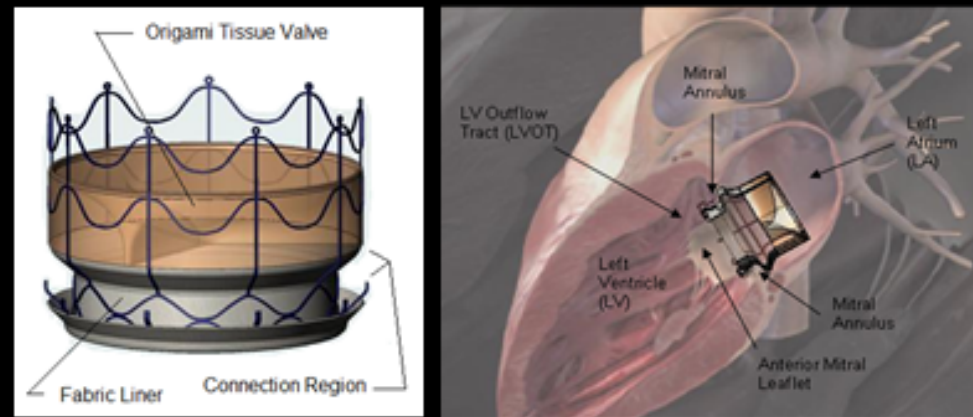
Neovasc's Choices



CardiAQ Public Presentations

CVT PMVR Implant

- *Incorporates CVT's platform technology*
- *Designed to address the specific challenges of the Mitral position*



Neovasc Opening: Admits Not a Good Decision

“Neovasc didn't tell CardiAQ when it decided to develop a competing device. CardiAQ told you that Neovasc should have done so.

We agree.

Neovasc is not going to defend that decision. We're not going to tell you that that was a good decision. It was not.”

“That's not the way people or companies ought to be treated.”

But Neovasc Did Not Prep Witness



Randy Lane
Neovasc VP of
Research and
Development

Q. And do you agree that that really wasn't a good decision by Neovasc not to tell CardiAQ about the Tiara program?

A. I don't think it was a bad decision. **I think it was the right decision.**

Q. You think it was the right decision. Do you know that Mr. Flynn, Neovasc's attorney, said in the opening statement here that it wasn't a good decision by Neovasc?

A. No, I didn't know that.

Witnesses Must Know Local Customs



Randy Lane
Neovasc VP of
Research and
Development

Q. So let's go back to your notebook, Exhibit 346, see if there's any more entries about your design that you were working on in 2010.

And if we go to page 163, please.

This is the date of March 17, 2010.

A. Yes.

Q. St. Patrick's Day, memorable day?

A. I don't really celebrate St. Patrick's Day.

The Audience Only Had Screenshots



Neovasc Watched the Movie



Damages

- Jury verdict: \$70 million
- Judge enhances damages: \$20 million
- Pre and post-judgment interest: \$22 million
- Total award: \$112 million COLLECTED

Dr. Quadri, Patient Astrid, & Brent Ratz



Lessons Learned

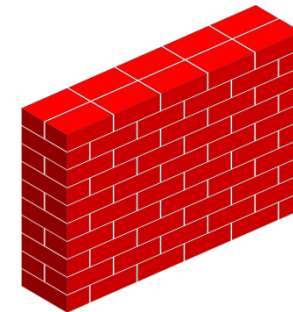
- Do not drop guard with NDAs
- NDAs have long-term implications
 - E.g., Choice of law
- Signed NDA \neq Trust in Recipient

Tip 1: PRESERVE Secrecy of Trade Secrets

- TREAT THE INFORMATION IN A CONFIDENTIAL MANNER!
 - Label or designate the information as “confidential.”
 - Use appropriate agreements with confidentiality clauses.
 - Limit access to the information only to those within the company who need to know it.
 - Do not publish or distribute the information to the world.

Tip 2: REVEAL Competitive Program Status

- To Protect Discloser:
 - Ask: status of Recipient's program?
 - Ask: which personnel are on program?
 - Require disclosure in NDA
- To Protect Recipient:
 - Disclose accurately and proactively
 - Segregate personnel
 - Document independent development



Tip 3: LIMIT Disclosure to Need-to-Know Content

- Best practice:
 - Re-assess after initial disclosure
 - Ask again about competitive programs
- Protect Recipient
 - Need to receive more info to perform service?
- Protect Discloser:
 - Need to disclose all info to receive service?

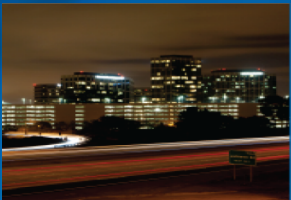
Tip 4: FOLLOW UP to comply with ongoing obligations

- Tracking ongoing obligations in NDA
- Monitor Compliance
- Typical oversights:
 - Mark all information disclosed “confidential”
 - Return disclosed materials at end of relationship
 - Enter a separate agreement if deal moves ahead

Tip 5: BEWARE of Standard Breach and Termination Clauses

- Be more specific to align with your business goals
- For revolutionary technology, be specific about injunctive relief

Thank you!
Questions? Christy.Lea@knobbe.com



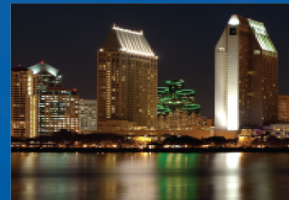
Orange County



Los Angeles



New York



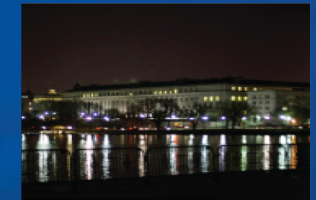
San Diego



San Francisco



Seattle



Washington DC