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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

WARSAW ORTHOPEDIC, INC.,
MEDTRONIC SOFAMOR DANEK
U.S.A., INC., MEDTRONIC
PUERTO RICO OPERATIONS CO.,
and OSTEOTECH, INC.,

Plaintiffs,

vs.

NUVASIVE, INC.,

Defendant.

AND RELATED
COUNTERCLAIMS.

CASE NO. 12-cv-2738-CAB (MDD)
ORDER DENYING MOTION TO
BIFURCATE WITHOUT PREJUDICE
[Doc. No. 191]

Before the Court is defendant/counterclaimant NuVasive, Inc.’s motion to bifurcate the jury trial of this patent infringement case. [Doc. No. 191.] Plaintiff/counterdefendants, the “Warsaw/Medtronic” entities,¹ filed an opposition. [Doc. No. 197.] NuVasive filed a reply. [Doc. No. 203.] The Court finds this motion suitable for determination on the papers submitted and without oral argument in accordance with Civil Local Rule 7.1(d)(1). Having considered the submissions of the parties, the motion is DENIED without prejudice.

¹ The “Warsaw/Medtronic” entities include Orthopedic, Inc.; Medtronic Sofamor Danek, U.S.A., Inc.; Medtronic Puerto Rico Operations Co.; Osteotech, Inc.; Medtronic, Inc.; Medtronic Sofamor Danek Deggendorf GMBH; Metronic Logistics, LLC; Medtronic Xomed, Inc.; and Spinalgraft Technologies LLC.

1 This patent infringement action has a long and involved history which is set forth
2 in the parties' papers and will therefore not be restated herein. In summary, despite a
3 very complex beginning, the case now before the court involves a single patent asserted
4 by some of the Warsaw/Medtronic entities against NuVasive, and a single patent
5 asserted by NuVasive against some of the Warsaw/Medtronic entities. NuVasive seeks
6 to bifurcate the jury trial and proceed only on the issues of infringement and invalidity
7 as to each patent. Then, if necessary, sit a second jury to hear the damages portion of
8 the case.

9 NuVasive makes a number of arguments about the complexity of presenting
10 damages evidence to a jury in combination with the liability evidence in a case
11 involving sophisticated medical products, and the potential efficiency of first obtaining
12 liability findings that might moot the need for the damages portion of the case. The
13 court is not persuaded at this time that those arguments justify the expense, delay, and
14 inefficiencies of impaneling two juries for this case.

15 As patent cases go, this case is fairly straightforward, involving one patent on
16 each side. The technology, although sophisticated, is not as challenging as the
17 technology asserted in Phase I² of this litigation, in which the jury heard liability,
18 validity, and damages evidence on four patents. The fact and expert discovery
19 regarding the parties' damage theories as to the two patents at issue in this litigation is
20 completed. NuVasive, according to its submission for the instant motion, is prepared
21 to file motions with the court challenging the plaintiff's damage claim, the result of
22 which may impact the scope of the trial presentation. Until such motions are heard and
23 decided, it is premature to evaluate the possible efficiencies of bifurcation.


24 The primary justification presented for bifurcation is NuVasive's contention that
25 a decision from the Federal Circuit on issues pending on appeal from the Phase I
26 litigation regarding the propriety of Warsaw's damage theories in that case will dictate
27 what can proceed in this action. Warsaw disagrees and contends the factual issues are

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² *Warsaw Orthopedic, Inc. v. NuVasive Inc.*, Case No. 3:08cv1512.

1 not parallel. Argument of the Phase I appeal has been scheduled for December 1, 2014.
2 There is, of course, no set time for a decision to issue, and a number of complex issues
3 were submitted on the appeal from Phase I. Dispositive motions in this case are set for
4 hearing on January 28, 2015. The status of the appeal and its relationship to the
5 theories in this case can be addressed at the January hearing, and NuVasive may renew
6 its request for bifurcation at that time, or at the pretrial conference. The court finds the
7 request at this juncture premature and it is DENIED without prejudice.

8 **IT IS SO ORDERED.**

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10 DATED: October 29, 2014

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13 **CATHY ANN BENCIVENGO**
14 United States District Judge
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