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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.

CASE NO. 3:12-cv-02738-CAB (MDD)
JOINT DISCOVERY PLAN
PURSUANT TO FED. R. CIV. P. 26(f)

Date: February 21, 2013
Time: 9:30 a.m.
Location: Hon. Dembin's Chambers
Judge: Hon. Mitchell D. Dembin

AND RELATED COUNTERCLAIMS

1 Plaintiffs Warsaw Orthopedic, Inc.; Medtronic Sofamor Danek U.S.A., Inc.; Medtronic
 2 Puerto Rico Operations Co.; and Osteotech, Inc. (collectively "Plaintiffs") and defendant NuVasive,
 3 Inc. ("NuVasive") hereby jointly submit the following discovery plan for the above-captioned matter
 4 pursuant to Fed. R. Civ. P. 26(f), Patent Local Rule 2.1, and Chamber Rule IV.B. As required by
 5 Rule 26(f)(1), the parties have met and conferred in an effort to reach agreement on this report. A
 6 short explanatory statement from each party is included on matters where the parties differ.

7 **A. Proposed Discovery Schedule**

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EVENT	PLAINTIFFS' PROPOSAL	NUVASIVE'S PROPOSAL
Fact Discovery Opens	2/1/13 (Fed. R. Civ. P. 26(d))	12/16/13 (or 7 days after claim construction hearing)
Parties to serve initial disclosures	2/14/13	2/14/13
Parties to serve Disclosure of Asserted Claims and Preliminary Infringement Contentions (Patent L.R. 3.1)	3/7/13	6/7/13
Parties to serve Preliminary Invalidity Contentions (Patent L.R. 3.3)	5/6/13	8/6/13
Parties to exchange Preliminary Claim Construction and Extrinsic Evidence (Patent L.R. 4.1)	5/20/13	8/20/13
Parties to exchange Responsive Claim Constructions (Patent L.R. 4.1)	6/3/13	9/3/13
Parties to file Joint Claim Construction Chart, Joint Claim Construction Worksheet, and Joint Hearing Statement (Patent L.R. 4.2)	6/17/13	9/17/13
Last day to request leave to amend/supplement pleadings	7/1/13	8/22/14
Claim construction discovery cutoff (Patent L.R. 4.3)	7/15/13	10/15/13
Opening claim construction briefs due (Patent L.R. 4.4.a)	7/29/13	10/29/13

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1	Responsive claim construction briefs due (Patent L.R. 4.4.b)	8/12/13	11/12/13
2	Claim construction and tutorial hearing (Patent L.R. 2.1)	8/30/13 (or per Court's calendar) (Patent L.R. 2.1.a.2)	12/9/13 (Patent L.R. 4.5)
3	Parties to serve final infringement contentions based on claim construction order (Patent L.R. 3.6.a)	30 days after claim construction order	30 days after claim construction order
4	Parties to serve final invalidity contentions based on claim construction order (Patent L.R. 3.6.b)	50 days after claim construction order	50 days after claim construction order
5	Parties to exchange list of expert witnesses expected to be called at trial	10/15/13	8/1/14 (or 3 weeks before the close of fact discovery)
6	Parties to exchange list of rebuttal expert witnesses expected to be called at trial	10/29/13	8/15/14 (or 1 week before the close of fact discovery)
7	Fact discovery cut-off	11/18/13	8/22/14 (8 months after NuVasive proposes that fact discovery opens)
8	Initial expert reports (by party with burden of proof on each issue)	12/16/13	9/22/14 (or 30 days after NuVasive proposes that fact discovery closes)
9	Rebuttal expert reports	1/13/14	10/22/14 (or 30 days after opening expert reports)
10	Reply Expert Reports (for secondary considerations of non-obviousness)	1/27/14	11/5/14 (or 14 days after rebuttal expert reports)
11	Expert discovery cut-off	2/24/14	12/26/14 (4 months after fact discovery closes)
12	Dispositive motion cut-off	3/10/14	1/23/14 (or 30 days after expert discovery cut-off)
13	Pretrial conference	4/7/14	4/6/15

No changes will be made in timing, form, or requirement for 26(a) disclosures.

Plaintiffs' Statement Concerning Their Proposed Schedule

On August 17, 2012, Plaintiffs filed this case in the Northern District of Indiana against Defendant, NuVasive, Inc., alleging infringement of three of Plaintiffs' patents by NuVasive's manufacture and sale of certain medical devices and procedures used in spinal surgery. (Dkts. 1 & 17.) On November 8, 2012, the Northern District of Indiana granted NuVasive's motion to transfer

1 this case to the Southern District of California. (Dkt. 32.) With respect to the dates on which the
2 parties differ, Plaintiffs have proposed a schedule to resolve efficiently its patent infringement claims
3 that have been pending for nearly six months. (Dkts. 1 & 17.) Under Plaintiffs' proposed schedule,
4 the parties would complete fact discovery by November 18, 2013 and expert discovery by February
5 24, 2014, and would participate in the pretrial conference on April 7, 2014. Plaintiffs' proposed
6 schedule would allow this case to be scheduled for trial within 24 months.

7
8 In contrast, NuVasive has proposed a schedule that would be inefficient and is contrary to the
9 Federal and Local Rules. *See* Fed. R. Civ. P. 26(d); Patent L.R. 2.5. Under NuVasive's proposal,
10 fact discovery would not even begin until after the claim construction hearing. There is no reason
11 why fact discovery cannot be conducted concurrently with claim construction briefing, as is typically
12 done in patent cases and has been done in another patent case between the parties before this Court
13 (*Warsaw Orthopedic, Inc. v. NuVasive, Inc.*, Case No. 3:08-cv-01512-CAB-MDD). Indeed, the
14 Local Rules prohibit a party from objecting to discovery requests as premature in light of the
15 timetable for claim construction provided by these rules except where the requests seek to elicit a
16 party's claim construction position, a comparison of the asserted claims against the accused products
17 or prior art, or the identification of opinions of counsel relating to allegations of willful infringement.
18 Patent L.R. 2.5.

19 Furthermore, NuVasive has proposed a schedule that runs counter to the arguments it made
20 to the Northern District of Indiana to support its transfer motion. There, NuVasive argued that trial
21 in California would not be slower than trial in Indiana because "complex patent cases of more than
22 two patents will be scheduled for trial within 24 months" in this district. (Dkt. 30 at 9, n. 5.) Now,
23 however, NuVasive proposes a schedule with a trial date well beyond the two-year mark. NuVasive
24 also proposes to extend the last day to request leave to amend or supplement the pleadings to
25 August 22, 2014 (to coincide with its proposed close of fact discovery), presumably so that it may
26 take discovery on an unpleaded inequitable conduct defense. Plaintiffs submit that their proposed
27 deadline of July 1, 2013 to amend or supplement pleadings is nearly one year from the filing of the
28 Complaint and gives sufficient time for NuVasive to conduct any necessary investigation or

1 discovery before amendment. NuVasive's proposal would also leave the parties with no time to take
2 discovery on any claims or defenses raised in the amended or supplemented pleadings.

3 NuVasive now asserts no fewer than four separate reasons why it believes this case, which
4 has been pending for nearly seven months, should be further delayed: 1) the Federal Circuit has yet
5 to rule on the appeal of the Phase I jury verdict between the parties; 2) delaying this case would
6 supposedly promote settlement; 3) NuVasive needs more time in order to assert its own patents; and
7 4) bifurcating damages and willfulness would allegedly permit the parties to focus their discovery
8 efforts. Each of these reasons fails. First, with the exception of the pending ongoing royalty issue,
9 this Court has already decided the issues relating to liability and damages for the Phase I patents.
10 There is no reason to assume (as NuVasive does) that the Court decided these issues incorrectly. In
11 any event, a Federal Circuit appeal will likely be concluded before the trial in this matter, under
12 either party's proposed schedule. Second, Plaintiffs disagree that delay would promote settlement
13 and instead believe the opposite to be true. Third, NuVasive has had nearly seven months since this
14 case was filed to consider asserting its own patents and has failed to identify even one that it intends
15 to assert. Finally, bifurcation of damages and willfulness, as well as all discovery relevant to those
16 issues, would be inefficient and burdensome given the overlap of those issues with other fact issues
17 in this case. This would lead to duplicative fact and expert depositions, and trial testimony, and
18 would not promote judicial economy. Accordingly, Plaintiffs propose that the Court adopt its
19 proposed schedule as set forth above and in accordance with the Local Rules.

20 NuVasive's Statement Concerning Its Proposed Schedule

21 The Court should stay these proceedings until the Federal Circuit has ruled on the appeal of
22 related Case No. 08-CV-1512 ("Phase 1"). Guidance from the Federal Circuit will help define the
23 contours of this litigation and may help the parties reach a global resolution eliminating the need for
24 this suit altogether. In the event the Court chooses not to stay, NuVasive proposes a phased
25 approach to litigating this case – an approach that provides the parties time to resolve their disputes
26 informally before being compelled to engage in expensive litigation. If the parties are unable to
27 resolve their disputes through ENE and/or mediation within 90 days, then NuVasive would assert its
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