

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

BOSTON SCIENTIFIC CORP. and
BOSTON SCIENTIFIC
NEUROMODULATION CORP.,

Plaintiffs,

v.

NEVRO CORP.,

Defendant.

C.A. No. 16-1163-GMS

**CORRECTED PLAINTIFFS' ANSWERING BRIEF
IN OPPOSITION TO NEVRO CORP.'S MOTION FOR LEAVE TO AMEND ITS
ANSWER TO ASSERT AN AFFIRMATIVE DEFENSE AND COUNTERCLAIM OF
UNENFORCEABILITY DUE TO INEQUITABLE CONDUCT**

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I. INTRODUCTION

In a last ditch effort to deflect from the merits of BSC's patent infringement case against it, Nevro belatedly moves to amend to add an affirmative defense and counterclaims of inequitable conduct that are not grounded in law or fact.

Nevro's allegations concern the conduct of BSC's prosecution and litigation counsel during the prosecution and an *Inter Partes Review* ("IPR") proceeding relating to U.S. Patent No. 6,895,280 ("280 Patent"), one of BSC's foundational patents directed to a novel spinal cord stimulation ("SCS") system. In both instances, the issue before the Patent Office was whether a specific reference disclosed limitations of the claimed inventions. BSC distinguished its claims by demonstrating that *those references* lacked a required limitation. Nevro's contentions here however, rest entirely on allegations that BSC failed to inform the Patent Office of what was *generally known* in the art. As the Patent Trial and Appeal Board (the "Board") recently reminded Nevro in denying a petition for rehearing in the IPR at issue here,¹ "[t]he mere fact that a feature may have been well-known in the prior art is insufficient to establish that it was present in a specific prior art reference." Ex. A at 4-5.² In any event, in each proceeding, BSC disclosed and the Patent Office was fully aware of what was known in the art. Because there can be no inference of materiality or intent, Nevro's proposed claims are futile.

Moreover, Nevro offers no justification for filing its motion more than three months after the deadline to amend, nor can it. Its proposed pleadings are based on information that has been in the public record for years, and it delayed in noticing the depositions of the inventors and the

¹ Nevro has filed three IPR petitions challenging certain claims of the '280 Patent, one of which is relevant to the present motion: IPR No. 2017-01811 ("the 1811 IPR"), filed on July 21, 2017. D.I. 194, Ex. A.

² Exhibits are attached to the Declaration of Karen L. Pascale filed concurrently herewith.

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