IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BOSTON SCIENTIFIC CORP. and BOSTON SCIENTIFIC NEUROMODULATION CORP.,	)	
Plaintiffs and Counter-Defendants,	)	
v.	)	Civil Action No. 16-1163-CFC-CJB CONSOLIDATED
NEVRO CORP.,	)	
Defendant and Counterclaimant.	)	

MEMORANDUM ORDER

Presently pending before the Court are the parties' discovery disputes regarding trade secret discovery. (*See* D.I. 331; D.I. 375)[1] The Court[2] has considered the parties' letter briefs, (D.I. 341; D.I. 344), and the parties' arguments made during the September 23, 2020 teleconference, ("Tr."). It ORDERS that the disputes be resolved in the manner set out below.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Court here writes primarily for the parties, who are well familiar with the discovery disputes relating to Plaintiffs Boston Scientific Corp. and Boston Scientific Neuromodulation Corp.'s ("Plaintiffs" or "BSC") trade secret claim (which is set out in Count IX of the operative

[1] These disputes originally arose in Civil Action No. 18-644-CFC-CJB ("Nevro II"). On June 22, 2020, the District Court consolidated Civil Action No. 16-1163-CFC-CJB ("Nevro I") and Nevro II. (Civil Action No. 18-644-CFC-CJB, June 22, 2020 Oral Order) All citations herein, unless otherwise noted, are to the docket in Nevro I.

[2] Nevro I and Nevro II have been referred to the Court to hear and resolve discovery disputes and protective order disputes. (Aug. 7, 2020 Docket Entry; Civil Action No. 18-644-CFC-CJB, D.I. 51 at 9)

Second Amended Complaint ("SAC")). In its August 21, 2020 Memorandum Order ("August 21 MO"), the Court provided an overview of the relevant background regarding BSC's and Defendant Nevro Corp.'s ("Defendant" or "Nevro") continuing disputes regarding trade secret discovery; the Court incorporates that summary herein by reference. (D.I. 326 at 1-4) The Court will only set out additional background facts as needed, in light of the current case posture.

The August 21 MO first addressed the parties' disputes regarding certain specific interrogatories and requests for production of documents propounded by BSC on February 10, 2020 in connection with its trade secret claim (the "February 2020 Discovery Requests"). (*Id.* at 6-13; *see also* Civil Action No. 18-644-CFC-CJB, D.I. 114, exs. A-B) In connection with these disputes, the Court had to determine what is the relevant time period relating to BSC's trade secret claim (the "relevant time period")—such that requests for discovery that sought information from outside of this time period would be deemed presumptively not relevant, absent the parties' agreement otherwise or some further order of the Court. Based on the record before it at the time, the Court concluded that the relevant time period "is the date in 2009 when [James] Thacker joined Nevro (whenever that is) to the time period when Nevro developed its own [spinal cord stimulation, or 'SCS'] system (which the Court understands, from the record before it, to be May 2010)." (D.I. 326 at 8)

In addition to resolving disputes regarding specific February 2020 Discovery Requests, the Court provided guidance on the parties' overarching dispute about whether BSC has sufficiently identified 64 purported trade secrets that it says were misappropriated and thus are subsumed within Count IX's allegations. (*Id.* at 13-18) The parties were ordered to further meet and confer on the issue in light of this guidance; to the extent they could not resolve their

disputes about these 64 purported trade secrets, they were ordered to utilize the Court's discovery dispute procedures. (*Id.*)[3]

On August 31, 2020, the parties submitted a joint status report regarding three issues that remain in dispute with respect to BSC's trade secret discovery. (D.I. 331) First is the parties' lingering dispute regarding the appropriate "relevant time period" to govern such discovery. (*Id.* at 2-3) Second is the parties' continuing dispute about whether BSC has sufficiently identified the 64 trade secrets at issue. (*Id.* at 1-2) To that end, BSC suggested that the Court provide its views "concerning the level of detail provided in [BSC's] Supplemental Disclosure [], which the parties will then use as a guide for the remaining 60 trade secrets." (*Id.* at 1) Third, the parties explained that they had a dispute regarding Nevro's trade secret document production, with Nevro withholding production based on its position that each of BSC's document requests requires further identification of the trade secrets at issue. (*Id.* at 3) The Court thereafter set telephonic argument for September 23, 2020, ordered the parties to submit supplemental letter briefs regarding the first two issues, and indicated that the Court would address the third issue during the teleconference. (D.I. 333)

BSC submitted its supplemental letter brief on September 9, 2020, (D.I. 341), and Nevro submitted its supplemental letter brief on September 16, 2020, (D.I. 344). The Court heard

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[3] By way of further background about this issue, after Nevro objected to the February 2020 Discovery Requests for, *inter alia*, failing to set out the particular trade secrets at issue, BSC identified these 64 purported trade secrets in an Initial Disclosure of Trade Secrets ("Initial Disclosure"). (Civil Action No. 18-644-CFC-CJB, D.I. 115, ex. F) Nevro disputed the sufficiency of BSC's Initial Disclosure, and provided, by way of illustrative example, an explanation as to why BSC's identification of four of the 64 trade secrets (Trade Secrets Nos. 2, 10, 47 and 56) were deficient. (*Id.*, ex. G) On May 29, 2020, BSC served a Supplemental Disclosure for Trade Secrets Nos. 2, 10, 47 and 56 ("Supplemental Disclosure") that included additional details and evidentiary citations. (Civil Action No. 18-644-CFC-CJB, D.I. 161 at 4; Civil Action No. 18-644-CFC-CJB, D.I. 162, ex. B; *see also* D.I. 332; D.I. 341 at 1)

argument from the parties on September 23, 2020. ("Tr.") Thereafter, on September 29, 2020, without first seeking leave from the Court, Nevro filed another letter regarding these disputes, in which it, *inter alia*, made a new proposal as to how the Court might resolve them. (D.I. 358) Because the letter did not follow the Court's discovery dispute procedures, and because Nevro had not sufficiently met and conferred about the letter's content with BSC, the Court struck the letter; it further ordered the parties to meet and confer regarding Nevro's new proposal. (D.I. 360) The parties did so and submitted a status report on October 9, 2020, in which it was reported that BSC did not agree to Nevro's proposal. (D.I. 371) Thus, the Court advised the parties that it would proceed to resolve the instant disputes. (D.I. 372)

II. STANDARD OF REVIEW

The Court incorporates by reference the legal principles regarding relevant discovery, and limits to discovery, set out in the August 21 MO. (D.I. 326 at 4-5)

III. DISCUSSION

The Court will first address the relevant time period issue, and will then turn to whether BSC has sufficiently identified Trade Secrets Nos. 2, 10, 47 and 56.

A. The Relevant Time Period

As described above, the Court recently concluded that the relevant time period for trade secret discovery is the date in 2009 when Mr. Thacker joined Nevro through May 2010 (i.e., the date by which Nevro had developed its first SCS system). (D.I. 326 at 8) For the following reasons, however, the current record demonstrates that the relevant time period for trade secret discovery should be modified to be December 2008 through May 2015.

As for the starting point of the relevant time period, it appears that Mr. Thacker was employed by Nevro first as a consultant in December of 2008 and then as a full-time employee

beginning on January 1, 2009. (Tr. at 11, 19; D.I. 341, ex. A) The SAC alleges that "[o]n multiple occasions, *while employed by Nevro*, Mr. Thacker disclosed Boston Scientific's confidential, proprietary information to Nevro." (Civil Action No. 18-644-CFC-CJB, D.I. 48 (hereinafter, "SAC") at ¶ 194 (emphasis added)) Thus, it is reasonable for the time period to begin in December 2008.

And as for the right ending point, May 2015 is when Nevro launched its first SCS product in the United States. (D.I. 341 at 1-2 & ex. D at 18-20; Tr. at 10, 22-23) The SAC alleges that during "the relevant time period" for the claim, Nevro was "developing its own SCS ['Senza'] system, and conducting its own clinical investigations." (SAC at ¶ 197) The Court now understands that there is no dispute that Nevro was conducting pivotal clinical trials (i.e., "clinical investigations") and related work up through its first U.S. product launch in 2015. (D.I. 341, ex. D at 18-20; Tr. at 29) And the SAC alleges that Mr. Thacker took over 34,000 files that included proprietary data regarding BSC's clinical investigations (as well as "research and development, product development plans, manufacturing plans and methods . . . patient data, programming specifications, marketing and sales force plans, product component lists, product specifications and diagrams, and budgetary, financial, and cost data"). (SAC at ¶ 192)

In opposing a time period extending up through May 2015, Nevro reads the SAC as alleging that the only relevant time period is that during which Nevro was conducting its "initial development" with respect to the Senza product, and that accordingly, the only "clinical investigations" relevant to BSC's trade secrets claim are any that occurred before Nevro's Senza product received CE Mark approval in Europe in 2010 (i.e., Nevro's "first clinical

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