

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

~~PROPOSED~~ **SCHEDULING ORDER FOR NON-HATCH-WAXMAN
PATENT CASES IN WHICH INFRINGEMENT IS ALLEGED**

This 20th day of May, 2022, the Court having conducted a status conference in this case, and the parties having determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation, or binding arbitration:

IT IS ORDERED that, for the purposes of the claims to be tried beginning on January 9, 2023, the instant Scheduling Order supersedes all prior scheduling orders that were entered in C.A. No. 16-1163 and consolidated C.A. No. 18-644;

IT IS FURTHER ORDERED that:

1. Relevant Deadlines and Dates. All relevant deadlines and dates established by this Order are set forth in the chart attached as **Exhibit A**.

2. Rule 26(a)(1) Initial Disclosures. The parties shall update their initial disclosures required by Federal Rule of Civil Procedure 26(a)(1) to reflect the issues that remain for trial in this case within five days of the date of this Order.

3. Disclosure of Asserted Claims and Infringement Contentions. The parties have already served Disclosures of Asserted Claims and Infringement Contentions for the patents that remain asserted in this case.

Boston Scientific served its Sixth Amended Infringement Contentions for U.S. Patent No. 6,895,280 (the “’280 patent”) on August 12, 2020 and Infringement Contentions for U.S. Patent Nos. 6,993,384 (the “’384 patent”); 7,853,330 (the “’330 patent”); and 8,682,447 (the “’447 patent”) on March 19, 2020.

~~[Boston Scientific: The Court lifted the stay of Boston Scientific’s patents during the April 13, 2022 Status Conference. 4/13/2022 Tr. at 111, 117:10-14 (Counsel for Nevro: “The Court lifted their stay. The question of the stay against counterclaims still exists.”)] [Nevro: BSC’s ’280, ’384, ’330, and ’447 patents are currently stayed until the Court signs a proposed order lifting the stay on BSC’s patents and Nevro’s counterclaim patents, which the Court instructed the parties to submit 4/13/2022 Tr. at 111:8-15, 117:11-118:25.]~~

Nevro served its First Supplemental Infringement Contentions for U.S. Patent Nos. 10,149,978 (the “’978 patent”); 9,002,461 (the “’461 patent”); 10,420,935 (the “’935 patent”); 9,002,460 (the “’460 patent”); and 10,076,665 (the “’665 patent”) (collectively, “Counterclaim patents”) on May 11, 2020. Nevro’s Counterclaim patents are currently stayed. ~~[Nevro: Nevro has been trying to work~~

~~with Boston Scientific to file a proposed order that would dismiss with prejudice of its counterclaims relating to the ’460 patent and the ’665 patent.]~~

4. Document Production Accompanying Disclosure of Asserted Claims and Infringement Contentions. Boston Scientific has already served Document Productions Accompanying Disclosure of Asserted Claims and Infringement Contentions for the ’384, ’330, and ’447 patents. Nevro has already served Document Productions Accompanying Disclosure of Asserted Claims and Infringement Contentions for its Counterclaim patents.

Boston Scientific has not yet completed disclosures consistent with this paragraph for the asserted claims of the ’280 patent. Accordingly, by no later than June 3, 2022, Boston Scientific shall produce to each opposing party or make available for inspection and copying the following information for the ’280 patent, to the extent it has not already done so:

- (a) Documents (e.g., contracts, purchase orders, invoices, advertisements, marketing materials, offer letters, beta site testing

agreements, and third party or joint development agreements) sufficient to evidence each discussion with, disclosure to, or other manner of providing to a third party, or each sale of or offer to sell, or any public use of, the claimed invention prior to the date of application for the asserted patent(s);

(b) All documents evidencing the conception, reduction to practice, design, and development of each claimed invention, which were created on or before the date of application for the asserted patent(s) or the priority date identified pursuant to paragraph 3(f) of this Order, whichever is earlier;

(c) A copy of the file history for each asserted patent;

(d) All documents evidencing ownership of the patent rights by the party asserting patent infringement;

(e) If a party identifies instrumentalities pursuant to paragraph 3(g) of this Order, documents sufficient to show the operation of any aspects or elements of such instrumentalities the patent claimant relies upon as embodying any asserted claims;

(f) All agreements, including licenses, transferring an interest in any asserted patent;

(g) All agreements that the party asserting infringement contends are comparable to a license that would result from a hypothetical reasonable royalty negotiation;

(h) All agreements that otherwise may be used to support the party asserting infringement's damages case;

(i) If a party identifies instrumentalities pursuant to paragraph 3(g) of this Order, documents sufficient to show marking of such Embodying Instrumentalities; and if the party wants to preserve the right to recover lost profits based on such products, the sales, revenues, costs, and profits of such Embodying Instrumentalities; and

(j) All documents comprising or reflecting a F/RAND commitment or agreement with respect to the asserted patent(s).

The producing party shall separately identify by production number the documents that correspond to each category set forth in this paragraph. A party's production of a document as required by this paragraph shall not constitute an admission that such document evidences or is prior art under 35 U.S.C. § 102.

5. Invalidity Contentions. Boston Scientific already served its Amended Invalidity Contentions for Nevro's Counterclaim patents on November 6, 2020. Nevro has already served its Invalidity Contentions on BSC's '384, '330, and '447 patents on June 1, 2020.

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