

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

BOSTON SCIENTIFIC CORP. AND
BOSTON SCIENTIFIC
NEUROMODULATION CORP.,

Plaintiffs and Counter-
Defendants,

v.

NEVRO CORP.,

Defendant and
Counterclaimant.

C.A. No. 16-1163-CFC
CONSOLIDATED

JOINT STATUS REPORT

In light of the upcoming *Markman* and Motions hearings on January 6, 2021, Plaintiffs and Counter-Defendants Boston Scientific Corp. and Boston Scientific Neuromodulation Corp. (“BSC”) and Defendant and Counterclaimant, Nevro Corp. (“Nevro”), by and through their undersigned counsel, submit this Joint Status Report. The parties provide an overview of the issues the Court has set for oral argument on January 6, 2021, including the number of disputed claim terms for construction that remain pending, and, to the extent the Court finds it helpful, provide the parties’ respective proposals for the January 6, 2021 hearing.

I. Issues Set For Oral Argument on January 6, 2021

A. Claim Construction

As reflected in the parties' Amended Joint Claim Construction Statement Regarding Defendant and Counter-claimant Nevro Corp.'s Asserted Patents (*see* D.I. 441) and the parties' Joint Proposed Claim Construction Charts Regarding Plaintiffs' Patents (D.I. 352), the disputed claim terms pending before this Court include those from Nevro's asserted patents from C.A. No. 18-cv-644 prior to consolidation (the "2018 Action") and those from BSC's asserted patents from C.A. No. 16-cv-1163 prior to consolidation (the "2016 Action").

With respect to Nevro's asserted patents, there remain 26 disputed claim terms, which the parties have briefed in 17 groups. *See* D.I. 441, Ex. A at 2-50; D.I. 437 at ii-v. With respect to BSC's asserted patents, there remain 18 disputed claim terms, which the parties have briefed in 7 groups. *See* D.I. 352, Ex. A at 6-32; D.I. 436, Ex. 1 at 1-5. Accordingly, in total, 44 claim terms briefed as 24 groups await resolution from the Court.

B. Parties' Motions for the '280 Patent

On December 17, 2020, the Court issued an Oral Order stating that "[f]ollowing the Markman hearing on 1/6/2021," oral argument will be heard on Nevro's Motion to Dismiss BSC's '280 Patent (D.I. 304) and BSC's Cross-Motion

to Re-assert Claims 21 and 26 of the '280 Patent and For Leave to Amend Infringement Contentions to Add New Products (D.I. 319).

The parties do not agree on whether claim construction activities should proceed for the '280 Patent while the parties' motions are pending. The parties' respective positions on this topic are set forth in the Joint Claim Construction Chart for BSC's patents. *See* D.I. 352 at 4-5.

C. BSC's Partial Motion to Dismiss Nevro's Affirmative Defenses and Counterclaims

The Court's December 17, 2020 Oral Order further stated that "[f]ollowing the Markman hearing on 1/6/2021," oral argument will be heard on BSC's Partial Motion to Dismiss Nevro's Affirmative Defenses and Counterclaims (C.A. 18-644, D.I. 81).

II. The Parties' Proposals for the January 6, 2021 Hearings

A. BSC's Proposal

The following chart summarizes the issues before the Court and scheduled for the January 6 hearing:

Issue	Dispute	Description
A	Motions Regarding BSC's '280 Patent (D.I. 304, 319) ¹	BSC moved to re-assert two claims and Nevro moved to dismiss the patent. BSC has proposed constructions for two terms

¹ BSC also moved to amend its infringement contentions to add Nevro's Senza II and Senza Omnia as accused products, which Nevro has not opposed (*see* D.I. 327 at 19-20).

		in the 280 patent and Nevro disagrees that claim construction should proceed while the motions are pending.
B	BSC's Motion to Dismiss the '935 Patent (D.I. 81) ² ;	BSC moved to dismiss Nevro's counterclaim regarding infringement of the '935 Patent. Six of the 17 disputed claim groups for Nevro's counterclaim patents are specific to the '935 Patent.
C	Claim Construction for BSC's 2016 Patents	A <i>Markman</i> hearing was held in 2017, but not all claims have been construed. If the '280 patent is included, there are 20 remaining disputed terms, divided into nine claim groups. The parties recently submitted supplemental briefing addressing how IPR proceedings may impact three of the nine claim groups.
D	Claim Construction for Nevro's 2018 Patents	There are 26 disputed claim terms, divided into 17 groups

BSC approached Nevro to discuss either a prioritization of issues or a proposed order of operations to present to the Court to maximize efficiency. Nevro had suggested that the parties jointly propose holding at least two hearings to allow sufficient time for argument. BSC subsequently sent Nevro a proposed order of sequencing hearings to resolve these issues in an efficient and practical manner. Nevro did not agree to that order and responded instead (below) with no suggestion

² BSC also moved to dismiss Nevro's inequitable conduct counterclaims directed to the currently-stayed BSC patents in the 2018 Action. Based on the stay in that case, it is not necessary for the Court to resolve that portion of BSC's motion at this time.

for how to handle the 24 claim groups currently in dispute, plus two motion hearings, within a three-hour schedule.

In view of the foregoing and to promote efficiency, BSC proposes utilizing the Court's time on January 6, 2021 to address: (Item A in the chart, above) the parties' respective motions related to the '280 Patent from the 2016 Action; (Item B) BSC's motion to dismiss Nevro's counterclaim regarding infringement of the '935 Patent (D.I. 81); and (Item C) the disputed terms in BSC's patents remaining from the 2016 Action. After the Court resolves BSC's motion to dismiss the '935 Patent (or at the Court's convenience), the parties can reconvene to address oral argument on remaining disputed terms in Nevro's counterclaim patents from the 2018 Action (Item D).

This proposal represents a practical approach to ensure the efficient use of judicial and party resources. The parties' respective motions with respect to the '280 Patent (Item A) present a discrete issue that impacts the scope of fact and expert discovery. The expedient resolution of that motion will permit the parties to complete and supplement discovery to address Nevro's newly-launched products prior to the fact discovery deadline (February 18, 2021) and in time for any needed supplemental expert discovery.

BSC's motion concerning Nevro's '935 Patent counterclaims (Item B) has the potential to narrow or eliminate disputed claim terms currently presented for the

Court's consideration. For that reason, it makes sense to resolve BSC's motion to dismiss prior to addressing the disputed proposed constructions of terms in Nevro's counterclaim patents.

With respect to BSC's affirmative patent claims (Item C), a majority of the disputed issues were briefed and/or argued already in 2017 before Senior Judge Sleet and there are only three groups of terms that were addressed recently by the parties in supplemental briefing. After years of delay due to Nevro's request to stay, these disputes are ripe for resolution.

Finally, with respect to Nevro's counterclaims (Item D), as a matter of practicality, it makes sense to turn to those only after determining the motion on the pleading. Any delay with respect to Nevro's counterclaims will not cause any unfair prejudice to Nevro and, in any event, is consistent with Nevro's lack of expediency in prosecuting its counterclaims. Nevro originally raised some of its counterclaims in related litigation years ago, but waited years before raising them again in a responsive pleading in the 2018 Action. Similarly, Nevro offered in support of its latest stay motion to "voluntarily stay its counterclaim patents," to be tried along with BSC's patents from the 2018 Action. June 22, 2020 Hrg. Tr. at 7:5-11. For those and other reasons, as discussed during the June 22, 2020 Hearing, BSC intends to move for a stay as soon as the PTAB determines whether to institute BSC's

petitions for IPR directed to a subset Nevro's counterclaim patents.³ The first two institution decisions are expected by March 2021.

B. Nevro's Proposal

Nevro proposes proceeding on January 6, 2021 as ordered by the Court with a *Markman* hearing on the remaining disputed terms (or a subset of terms, as instructed by the Court) followed by oral argument on the parties' respective motions regarding the '280 patent (D.I. 304, 319) and BSC's partial motion to dismiss Nevro's affirmative defenses and counterclaims (C.A. No. 18-644, D.I. 81).

Nevro disagrees with BSC's proposal for the January 6, 2021 hearing and its proffered rationale, and will be prepared to address all of the foregoing issues at the January 6th hearing, as per the Court's Oral Order on December 17, 2020.

* * *

The parties are available for a Status Conference should the Court wish to discuss the foregoing.

³ BSC recently filed IPR petitions for three of Nevro's counterclaim patents asserted in the 2018 Action: (1) the '460 Patent (No. IPR2020-01562); (2) the '665 Patent (IPR2020-01563); and (3) the '461 Patent (IPR2021-00295).

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