UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AVANOS MEDICAL, INC.,

Petitioner,

v.

STRATUS MEDICAL, LLC,

Patent Owner.

Case IPR2024-01209
Patent 10,966,782

PETITIONER'S MOTION FOR ADDITIONAL DISCOVERY

As authorized by the Board during a conference call held on June 24, 2025, Petitioner moves for additional discovery under 37 CFR § 42.51(b)(2).

I. Petitioner's Requested Discovery

On June 17, 2025, Petitioner served the requests for production ("RFPs") included in Exhibit 1036 on Patent Owner. The parties conferred regarding RFPs 1-7, and Patent Owner agreed to produce certain documents and things in response to some (but not all) RFPs. Petitioner is mindful of the time constraints in this proceeding and the Board's conservative approach to granting additional discovery. Accordingly, Petitioner agrees to the scope of discovery that Patent Owner previously agreed to produce with respect to RFPs 4-7 (*infra* § III) and seeks relief in this motion as to only RFPs 1-3.

As indicated below, RFPs 1-3 are narrowly tailored to specific documents related to secondary considerations evidence and arguments introduced in the Patent Owner Response ("POR"). Petitioner requests that the Board grant its motion with respect to RFPs 1-3 for the reasons provided herein.

RFP No. 1: Documents sufficient to show Patent Owner's sales in units, gross revenue, and net revenue for each Nimbus® Multitined Expandable Electrode Product Code (including a description of the device associated with each product code) for each of the fiscal years 2020, 2021, 2022, 2023, and 2024.

RFP No. 2: Documents sufficient to show Patent Owner's sales in units, gross revenue, and net revenue for each Nimbus® Probe RF Thermocouple Electrode Product Code (including a description of the device associated with product code) for each of the fiscal years 2020, 2021, 2022, 2023, and 2024.

RFP No. 3: All documents and electronically stored information relied on by Cody Jorgensen to prepare the information in paragraphs 16 through 27 (and the associated charts and graphics) of his declaration (Patent Owner's Exhibit 2015).

II. Petitioner's requested discovery is in the interests of justice.

Petitioner's motion should be granted as discovery of the requested documents in RFPs 1-3 is "necessary in the interest of justice." 35 U.S.C. § 316(a)(5); *Garmin Int'l, Inc., et al v Cuozzo Speed Technologies LLC,* IPR2012-00001, Paper 26 (Mar. 5, 2013). Each of the five *Garmin* factors favors the grant of Petitioner's requested discovery. *See Garmin* at 6-7.

a. *Garmin* Factor 1: More than a possibility and mere allegation.

Petitioner is already in possession of evidence that shows "beyond speculation" that its requested discovery will yield evidence that is central to issues raised by Patent Owner in this trial. *See Garmin* at 6 (factor 1).

RFPs 1 and 2 request documents related to Patent Owner's argument that its "sales figures provide compelling evidence of commercial success." POR at 69. In support of this argument, Patent Owner filed a declaration from its Director of

Marketing (Mr. Jorgensen). *See* Ex-2015 (confidential Jorgensen declaration); Ex-2016 (public Jorgensen declaration). Among other things, Mr. Jorgensen testifies regarding "Stratus's total U.S. revenue by quarter from 2020 through 2024" and provides a chart indicating these revenue figures. Ex-2016 (and Ex-2015), ¶15.

According to Patent Owner, the revenue figures provided by Mr. Jorgensen are relevant because "Stratus's Nimbus devices are commercial embodiments of the invention." POR at 68. Patent Owner argues that "a nexus should be presumed" because the "Nimbus device" is a combination of its Nimbus "neurotomy ***needle***" and Nimbus "radiofrequency ***probe***." POR at 73-74 (emphases added). Indeed, there is no dispute among the parties that the challenged claims require ***both*** a needle and a probe. *See e.g.*, Ex-2008, 1 ("Stratus's Nimbus® RF Multitined Expandable Electrode (Nimbus RF Neurotomy Needle) and Stratus's RF Probe together form a system that meets the limitations of the claim[s]."); POR at 68 (citing Ex-2008) and 1, 36 (discussing probe); Ex-1001, 52:19-23.

Yet Patent Owner sells its Nimbus needles and Nimbus probes separately—and in many different versions. Ex-1041, 2 (four versions of the needle) 8, 11 (six versions of the probe); POR at 14 (describing reusable and non-reusable versions of the Probe). Furthermore, certain versions of the Nimbus needles appear designed for use with probes not sold by Patent Owner. Ex-1041, 3 (model NIM-100-10BB-CS described as "compatible with 100mm Avanos white probe"). And

half of Patent Owner's Nimbus probe models are reusable, eliminating the need to purchase a Nimbus probe in combination with each Nimbus needle. Ex-1041, 8 (reusable probes), 11 (disposable probes).

Patent Owner's alleged nexus between its revenue and the patent claims is based entirely on combining sales of different products—the Nimbus needles and the Nimbus probes. POR at 68-69 and 73-74; Ex-2008, 1. As outlined above, Petitioner is already in possession of evidence that shows "beyond speculation" that these products are, in fact, sold separately and in different versions—not as a single "Nimbus device." POR at 68-69 and 73-74; Ex-1041, 2 (needles) and 8, 11 (probes). Mr. Jorgensen's testimony—which provides only "Stratus's total U.S. revenue by quarter from 2020 through 2024"—does not indicate how many Nimbus needles were sold (or which versions) or how many Nimbus probes were sold (or which versions), much less the gross and net sales revenue for each needle and probe version. Ex-2016 (and Ex-2015), ¶15.

Patent Owner is doubtlessly in possession of this information. Indeed, it is highly implausible that Mr. Jorgensen could have prepared the *detailed* revenue information in his declaration without referring to documents or other business records showing the unit sales and gross/net revenue for each version of the needles and probes sold by Patent Owner. Ex-2015, ¶15; POR at 69. Because there

is no dispute that multiple products are being sold, RFPs 1 and 2 seek to identify the sales that Patent Owner introduced by "Product Code[s]." Ex-1036, 3-4.

Petitioner is entitled to this information (the subject of RFPs 1 and 2), which will be useful, highly probative of Patent Owner's commercial success arguments, and essential for cross-examining Mr. Jorgensen. *See e.g.*, *Brunswick Corp. v. Volvo Penta of the Americas, LLC*, IPR2020-01512, Paper 25 at 3-6, 14 (May 12, 2021) (granting discovery of documents showing "gross and net revenue derived from sales of the [relevant] Products, as well as orders and/or sales in units … by year"); *Kolbe & Kolbe Millwork Co., Inc., v. Sierra Pacific Indus.*, IPR2019-00933, Paper 33 at 4, 17 (Dec. 30, 2019) (granting discovery of documents showing "gross and net revenue derived from sales of the [relevant] Products, as well as sales in units … by year"); Consolidated Trial Practice Guide, 28 (highlighting frequent additional discovery relating to "secondary evidence of non-obviousness").

RFP No. 3 requests documents that Mr. Jorgensen relied on "to prepare the information in paragraphs 16 through 27" of his declaration (Ex-1036, 4), in which he discusses "the U.S. market in which Stratus competes." Ex-2016 (and Ex-2015), ¶¶16-27. Mr. Jorgensen offers this discussion of Patent Owner's U.S. market to support his assertion that "Stratus has enjoyed remarkable commercial success with the Nimbus device." Ex-2016 (and Ex-2015), ¶13. Furthermore, Patent Owner

relies on this testimony throughout its commercial success arguments. POR at 70-73. However, neither Mr. Jorgensen nor Patent Owner have provided any of the documents or information that were clearly relied on by Mr. Jorgensen to prepare the U.S. market discussion in his declaration.

Throughout paragraphs 16-27 of his declaration, Mr. Jorgensen provides **(i)** a diagram "depict[ing] market shares of remaining market participants" for 2019–2024; **(ii)** a "chart show[ing] side-by-side comparisons of the full … market … as it existed in 2020 and 2024," including "each company's sales force;" **(iii)** a "chart show[ing] the compounded annual growth rages (CAGR) of … market participants from 2020 through 2024;" and **(iv)** a "chart depict[ing] year-by-year snapshots … divided by among market participants." Ex-2016 (and Ex-2015), ¶¶16-27. Despite Mr. Jorgensen's assertion that he has "personal knowledge of the facts stated in this declaration" (Ex-2016, ¶2), it is self-evident that Mr. Jorgensen relied on documents or electronically stored information in preparing these charts and underlying data (if in fact the charts were prepared by him at all). Indeed, the information included in Mr. Jorgensen's discussion of "the U.S. market in which Stratus competes" is largely focused on metrics for market participants *other than Patent Owner*. Ex-2016 (and Ex-2015), ¶¶16-27. It would be impossible for Mr. Jorgensen to have obtained this information about other market participants

without relying on documents or other electronically stored information—none of which have been provided to Petitioner or otherwise identified.

Quite simply, it is "beyond speculation" that Mr. Jorgensen relied on documents or information beyond his own memory to prepare paragraphs 16-27 of his declaration. These documents—relied on in Mr. Jorgensen's direct testimony that forms the basis of Patent Owner's commercial success arguments—are by their very nature material and useful. POR at 70-73 (citing Jorgensen declaration). Petitioner is entitled to these documents under Rule 42.51(b)(2) for the purpose of cross-examining Mr. Jorgensen and evaluating (and rebutting) Patent Owner's arguments with respect to commercial success. *See* 77 Fed. Reg. 48,612, 48,641 (Aug. 14, 2012) (Response to Comment 136: "[W]here a party's witness has a non-privileged document or thing and has referred to it during their testimony, the interests-of-justice and good cause standards would generally weigh in favor of producing the document or thing to the opponent taking the cross-examination.").

b. *Garmin* Factor 2: Petitioner seeks no information about Patent Owner's litigation positions or underlying basis.

RFPs 1-3 relate to Patent Owner's secondary considerations evidence and do not seek litigation positions or their underlying basis.

c. *Garmin* Factor 3: Petitioner cannot generate equivalent information by other means.

RFPs 1 and 2 relate to Patent Owner's sales information, which Patent Owner has designated as confidential and is not accessible by Petitioner. POR at 69; Ex-2016, ¶15. RFP 3 relates to documents relied on by Mr. Jorgensen in preparing his declaration, which are not known to Petitioner or otherwise accessible without a discovery request. Patent Owner has also designated the majority of Mr. Jorgensen's testimony regarding its U.S. market as confidential. POR at 70-73; Ex-2016, ¶16-27.

d. *Garmin* Factors 4 and 5: Petitioner's RFPs are easily understandable and not overly burdensome to answer.

RFPs 1-3 are easily understandable and directed to specific documents in Patent Owner's possession. The parties have met and conferred regarding RFPs 1-3, and Patent Owner has not raised any concerns regarding the RFPs being understandable or overly burdensome.[1]

RFPs 1-2 relate to a narrow set of financial documents that Patent Owner should have readily available, particularly in view of the sales information

[1] Petitioner also offered to submit RFPs 1 and 2 in the form of an interrogatory requesting the same sales information. Patent Owner declined to provide the requested information.

prepared by Mr. Jorgensen just one month ago. Ex-2015 (and Ex-2016), ¶15. RFP 3 relates to documents that Mr. Jorgensen relied on in preparing his recent declaration and should therefore be readily available for production. Ex-2015 (and Ex-2016), ¶¶16-27.

For at least the foregoing reasons, the requested discovery in RFPs 1-3 is necessary in the interests of justice and Petitioner therefore requests that the Board issue an order granting these limited and narrowly tailored requests.

III. Scope of Discovery Agreed to by the Parties (RFPs 4-7)

Per the Board's scheduling order, the parties conferred regarding Petitioner's requested discovery (Ex-1036). For RFP 4, Patent Owner agreed to provide the requested information. For RFP 5, Patent Owner agreed to provide one sample of the requested device, which is acceptable to Petitioner. For RFPs 6 and 7, Patent Owner agreed to provide the completed application provided to Deloitte and the completed questionnaire provided to Pepperdine, which is acceptable to Petitioner.

Respectfully submitted,

Dated: June 25, 2025

/Christopher B. Kelly/
Christopher B. Kelly (Reg. No. 62,573)
Lead Counsel for Petitioner

PETITIONER'S UPDATED EXHIBIT LIST

Exhibit No.	Description
1001	U.S. Patent No. 10,966,782 to Wright et al. (issued April 6, 2021) ("'782 Patent")
1002	U.S. Patent No. 10,736,688 to Wright et al. (issued August 11, 2020) ("'688 Patent")
1003	U.S. Patent No. 10,925,664 to Wright et al. (issued February 23, 2021) ("'664 Patent")
1004	U.S. Patent No. 11,806,070 to Wright et al. (issued November 7, 2023) ("'070 Patent")
1005	U.S. Patent No. 10,716,618 to Wright et al. (issued July 21, 2020) ("'618 Patent")
1006	The Complete File History of the '782 Patent, U.S. Patent App. No. 16/933,811 (filed July 20, 2020) (the '811 application)
1007	The Complete File History of the '688 Patent, U.S. Patent App. No. 15/098,673 (filed April 14, 2016) (the '673 application)
1008	The Complete File History of the '664 Patent, U.S. Patent App. No. 16/933,995 (filed July 20, 2020) (the '995 application)
1009	U.S. Patent No. 6,146,380 to Racz et al. (issued November 14, 2000) ("Racz")
1010	U.S. Publication No. 2007/0016183 to Lee et al. (published January 18, 2007) ("Lee")
1011	U.S. Publication No. 2005/0059964 to Fitz (published March 15, 2005) ("Fitz")
1012	U.S. Publication No. 2006/0084965 to Young (published April 20, 2006) ("Young '965")
1013	U.S. Publication No. 2007/0260223 to Scheibe et al. (published November 8, 2007) ("Scheibe")
1014	U.S. Patent No. 7,976,542 to Cosman et al. (filed on March 2, 2006 and issued on July 12, 2011) ("Cosman '542)
1015	U.S. Publication No. 2007/0027449 to Godara et al. (published on February 1, 2007) ("Godara")
1016	U.S. Publication No. 2009/0112201 to Young (published April 30, 2009) ("Young '201")

Exhibit No.	Description
1017	U.S. Patent No. 6,652,516 to Gough (filed November 19, 1999 and issued on November 25, 2003) ("Gough '516").
1018	U.S. Patent No. 5,728,143 to Gough (filed February 14, 1996 and issued on March 17, 1998) ("Gough '143")
1019	Cohen et al., Randomized Placebo-controlled Study Evaluating Lateral Branch Radiofrequency Denervation for Sacroiliac Joint Pain, Anesthesiology, Vol. 109, Issue 2, 279-288 (2008) ("Cohen")
1020	U.S. Patent No. 6,551,302 to Rosinko (filed on October 26, 2000 and issued on April 22, 2003) ("Rosinko")
1021	U.S. Patent No. 5,855,576 to LeVeen et al. (filed on December 12, 1996 and issued on January 5, 1999) ("LeVeen")
1022	U.S. Patent No. 7,918,852 to Tullis et al. (filed May 1, 2006 and published January 18, 2007) ("Tullis")
1023	U.S. Patent No. 4,411,266 to Cosman (issued October 25, 1983) ("Cosman '266")
1024	U.S. Patent No. 7,195,629 to Behl et al. (filed August 18, 2003 and issued March 27, 2007) ("Behl")
1025	U.S. Patent No. 5,782,827 to Gough et al. (filed December 19, 1995 and issued July 21, 1998) ("Gough '827")
1026	U.S. Patent No. 5,928,229 to Gough et al. (filed October 30, 1997 and issued July 27, 1999) ("Gough '229")
1027	U.S. Patent No. 9,078,678 to Zerfas et al. (filed March 21, 2013 and issued July 14, 2015) ("Zerfas")
1028	U.S. Patent App. Pub. No. 2007/0203486 to Young (published August 30, 2007) ("Young '486")
1029	U.S. Patent App. Pub. No. 2005/0159797 to Chandran et al. (published July 21, 2005) ("Chandran")
1030	U.S. Patent App. Pub. No. 2008/0269774 to Garcia et al. (published October 30, 2008) ("Garcia")
1031	Declaration of Dr. Robert D. Tucker (July 26, 2024)
1032	Reserved
1033	Reserved

Exhibit No.	Description
1034	Reserved
1035	CV of Robert D. Tucker, Ph.D., M.D.
1036	Petitioner's Requests for Production
1037	Highlighted version of Stratus Exhibit 2015 (confidential designated version of Jorgensen Declaration) **PROTECTIVE ORDER MATERIAL—OUTSIDE COUNSEL ONLY** (based on Stratus's designation)
1038	Stratus Press Release dated Aug. 8, 2019, *available at* https://stratusmedical.com/2019/08/09/med-venture-holdings-announces-new-ceo-appointment-for-nimbus/
1039	Stratus Press Release dated Jan. 15, 2020, *available at* https://stratusmedical.com/2020/01/15/stratus-medical-completes-private-placement-financing-and-acquisition-of-the-nimbusrf-business-for-expansion-in-the-interventional-pain-medicine-space/
1040	Stratus "Clinical References," *available at* https://stratusmedical.com/clinical-compendium/
1041	Stratus "2023 Product Catalog," *available at* https://stratusmedical.com/product-catalog/

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e) and agreement of the parties, I certify that on June 25, 2025, a copy of this paper and all accompanying exhibits were served on counsel for the Patent Owner by email to:

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