Outlook

RE: Additional Discovery

From Chris Kelly <ckelly@mcciplaw.com>
Date Thu 6/19/2025 9:19 AM
To Matthew Phillips <mphillips@lpiplaw.com>
Cc Gregory Carlin <GCarlin@mcciplaw.com>; Warren Thomas <wthomas@mcciplaw.com>

1 attachment (21 KB)
Email to Board June 19th.docx;

Matt:

Thanks for your message. I've attached a draft email to the Board, which I think would be appropriate to send on behalf of both parties. The intent is to tee up the issues for the panel without getting too far into the details (unless they request more information). Please let me know if you have any edits to this Board communication. I've included the parties availability for a call based on Dan Higgs' correspondence yesterday.

Some additional notes on the outstanding issues are below:

Additional Discovery
Thank you for your updates on RFPs 1-7. We've noted in the draft email to the Board your willingness to work with us on some of these. We will still pursue the full scope of RFPs 1-7 via our motion if we receive permission to file it. We will note what you have consented to provide in that motion also.

Any documents produced by Stratus that are marked Confidential or Outside Counsel Only we will treat consistently with the Protective Order. With respect to RFP No. 5, we would agree to return any responsive sample devices you provide at the conclusion of this matter. For the avoidance of doubt, however, we would not expect any sample device itself to be subject to the protective order. Our understanding of Mr. Crosby's testimony is that he reviewed only a commercially available device. Thus, any confidential or otherwise non-public device provided by Stratus would not be responsive to our request.

Deposition of Professor Russo
In the interest of clarity, I wanted to confirm our position on Prof. Russo's deposition. Our request is that Prof. Russo is made available for an in-person deposition at a reasonable location in the continental United States. We request that this deposition occur at some point on or after July 21st and during normal business hours. We are glad to travel to a reasonable location within the continental United States to reduce the burden on Prof. Russo as much as possible (e.g., if doing the deposition on the West Coast is easier for him, we are open to that). Our understanding is that Prof. Russo's challenge is one of time and so we assume conducting his deposition by video conference—with him in the continental United States and on US time zones—would not meaningfully reduce the burden on him. But, if for some reason this would make a difference, please let us know.

With respect to your request that Dr. Russo participate by video conference in Australia, we do not agree to this proposal under Rule 42.53(b)(3). Our understanding is that Australia is a party to the Hague Evidence Convention and that Patent Owner has not obtained any requisite approvals under Australian laws or the Hague Convention. Moreover, even if such approvals were obtained, we have remaining concerns regarding the extreme time zone differences and the potential for technology disruptions that would impact our ability to efficiently cross-examine Dr. Russo. We appreciate that the parties have different views on this issue, but we wanted to clarify our position as much as possible before any discussions with the Board.

Deposition of Peter Crosby

Thank you for checking with Mr. Crosby regarding his additional availability. We will table the discussion around his deposition until you have some feedback from him.

Concerns Regarding Petitioner's Objections to Evidence

I also note your concern regarding Petitioner's objections to evidence, "specifically to page 5, right column after 'FRE 602' and the parenthetical following paragraph numbers '16-27, 47.'" We note that Mr. Jorgensen's publicly available declaration (Ex-2016) indicates that his discussion following paragraph 16 is directed to "the U.S. market in which Stratus competes." The U.S. market in which Stratus competes is well-known and not confidential. Stratus publicly describes itself as "a company focused on advancing radiofrequency (RF) ablation treatment" and publicly sells "radiofrequency ablation (RFA) cannula[s]." Mr. Jorgensen also describes in Ex-2016 that "Stratus's foundational technology is the Nimbus device, which uses radiofrequency energy to ablate nerves" (¶7) and indicates that the Nimbus product is a "cannula" device (¶33-35). I hope this resolves your concern.

Best regards,

Chris

Chris Kelly
Principal
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From: Matthew Phillips <mphillips@lpiplaw.com>
Sent: Wednesday, June 18, 2025 5:48 PM
To: Chris Kelly <ckelly@mcciplaw.com>
Subject: Re: Additional Discovery

Caution: This email originated from outside your organization.

Chris,

Thank you for your patience. Upon reconsideration, Stratus is willing to provide the following:

- Regarding RFPs 1-2, Stratus will provide annual gross revenue for each of the needle and probe separately.
- Regarding RFP 3, that is still a hard no.
- Regarding RFP 4, Stratus will provide the requested information, as we have previously indicated.
- Regarding RFP 5, Stratus will provide one sample of the device.
- Regarding RFP 6, Stratus will provide the completed application provided to Deloitte.
- Regarding RFP 7, Stratus will provide the completed questionnaire provided to Pepperdine.

All of this material will be designated OUTSIDE COUNSEL ONLY under the protective order. We will also require that you return the sample device at the conclusion of the case. This is highly sensitive information from Stratus, and we ask that you exercise a high level of diligence complying with the protective order. Unfortunately, we noticed that your objections filed publicly on June 2 revealed some information that we had designated as confidential and redacted. I refer specifically to page 5, right column after "FRE 602" and the parenthetical following paragraph numbers "16-27, 47." I assume that was unintentional, but it underscores the importance of diligence with respect to confidentiality.

We are also checking with Peter Crosby for greater availability for his deposition. We will let you know about that when we know more.

Stratus is providing this information in a good-faith effort to cooperate and to narrow our discovery disagreements, not because we believe Avanos is entitled to any of this information under the standards for additional discovery in an IPR.

I know this won't resolve all our discovery disputes, so you should continue with your plan to reach out to the Board if you want anything else. I also believe it would be a good idea to raise the issue of Dr. Russo's deposition with the Board at the same time, so that we do not need to bother the Board another time regarding that.

We will email you separately with our availability for a call with the Board next week.

--Matt

From: Chris Kelly <ckelly@mcciplaw.com>
Sent: Wednesday, June 18, 2025 2:14 PM
To: Matthew Phillips <mphillips@lpiplaw.com>
Subject: RE: Additional Discovery

Sure thing. But I would like to email the Board tomorrow morning given time crunch to get the process moving, so would appreciate if we could make that happen. Obviously if we resolve some of the issues in the interim we can let the Board know and narrow the scope before any call with them.

IPR2024-01212
Avanos v. Stratus
Stratus Ex. 2038

Chris Kelly

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From: Matthew Phillips <mphillips@lpiplaw.com>
Sent: Wednesday, June 18, 2025 2:08 PM
To: Chris Kelly <ckelly@mcciplaw.com>
Subject: Additional Discovery
Importance: High

Caution: This email originated from outside your organization.

Chris,

Before you email the Board, could you please wait a bit? I want to check with Stratus one more time to see if we might be able to provide some more of the information you requested in your RFPs. I should know by the end of the day. Thanks.

--Matt