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**Datasheet for the decision  
of 7 February 2024**

**Case Number:** T 0291/19 - 3.4.01

**Application Number:** 08847097.6

**Publication Number:** 2207587

**IPC:** A61N1/36, A61N1/05

**Language of the proceedings:** EN

**Title of invention:**

MULTI-FREQUENCY NEURAL TREATMENTS AND ASSOCIATED SYSTEMS AND METHODS

**Patent Proprietor:**

Nevro Corporation

**Opponents:**

MEDTRONIC INC.  
Boston Scientific Neuromodulation Corporation

**Headword:**

Spinal Cord Stimulation System / Nevro Corporation

**Relevant legal provisions:**

EPC Art. 100 (c), 123 (2)

**Keyword:**

Grounds for opposition - added subject-matter (yes)

Decision in written proceedings (yes) - request for oral proceedings withdrawn



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0291/19 - 3.4.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.01**  
**of 7 February 2024**

**Appellant:** MEDTRONIC INC.  
(Opponent 1) 710 Medtronic Parkway  
Minneapolis, MN 55432 (US)

**Representative:** August Debouzy  
7, rue de Téhéran  
75008 Paris (FR)

**Appellant:** Boston Scientific Neuromodulation Corporation  
(Opponent 2) 25155 Rye Canyon Loop  
Valencia, CA 91355 (US)

**Representative:** Vossius & Partner  
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81675 München (DE)

**Respondent:** Nevro Corporation  
(Patent Proprietor) 1800 Bridge Parkway  
Redwood City, CA 94065 (US)

**Representative:** Forresters IP LLP  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 4 January 2019  
rejecting the opposition filed against European  
patent No. 2207587 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

<b>Chairman</b>	P. Scriven
<b>Members:</b>	T. Zinke
	C. Almberg

## **Summary of Facts and Submissions**

- I. European Patent EP 2 207 587 B1 is based on a PCT-application that was originally published as WO2009/061813 A1, without claims 22 to 26. A corrected version was published as WO2009/061813 A9.
- II. Opponent 1 (Medtronic Inc.) and Opponent 2 (Boston Scientific Neuromodulation Corporation) filed notices of opposition.
- III. Both opponents appealed the Opposition Division's decision to reject their oppositions.
- IV. The notices of opposition of the opponents included, *inter alia*, objections of added subject-matter under Article 100(c) EPC.
- V. In appeal proceedings, both opponents requested that the decision be set aside and that the patent be revoked, arguing, *inter alia*, added subject-matter.
- VI. The proprietor requested that the appeals be dismissed (main request), or that the patent be maintained on the basis of an auxiliary request submitted during opposition proceedings.

VII. All parties requested oral proceedings only in the event that their main request was not granted.

VIII. Claim 1 of the patent reads:

*A system for treating patient pain, comprising:  
a controller having instructions to direct first electrical signals in a first frequency range and to direct second electrical signals in a second frequency range;  
first electrodes electrically coupled to the controller to receive the first signals and configured to be positioned proximate to a first target location of the patient's spinal cord region; and  
second electrodes electrically coupled to the controller to receive the second electrical signals and configured to be positioned proximate to a second target region of the patient's spinal cord region, characterized in that the first frequency range is up to 1,500 Hz, and the second frequency range is from 2,500 Hz to 100,000 Hz.*

IX. In the auxiliary request, only claim 13 is amended. Claim 1 is unchanged.

X. In a communication sent with a summons to oral proceedings, the Board expressed the preliminary opinion (Articles 15(1) and 17(2) RPBA 2020), *inter*

*alia*, that claim 1 of both requests comprised added subject-matter.

XI. The relevant sections of the preliminary opinion read:

[...]

*Main request - interpretation*

*2. Both opponents objected, in their respective statement of grounds, to the claim construction used by the Opposition Division, against its apparent lack of willingness to provide details of its claim construction during oral proceedings, and against an apparent failure to deal with their arguments in that regard in the decision (opponent 1 statement of grounds, page 5, 5th and 6th paragraph; page 8, 6th to 9th full paragraphs; opponent 2 statement of grounds, paragraph bridging pages 1 and 2).*

*3. Since the Board agrees that claim interpretation is important to any discussion of patentability, some aspects with regard to interpretation of claim 1 will be addressed here first.*

*4. Reading features into the claim that are only related to the therapeutic application should be avoided.*

*5. A first point concerns the first and second electrodes. Opponent 2 argued that*

*the claim did not define that the first signals were only directed to the first electrodes and the second signals only to the second. The claim wording thus also encompassed the possibility that the first and second signals were transmitted to all electrodes, and that the first and second electrodes might in fact be the same electrodes (opponent 2 statement of grounds, section 4.1).*

*6. The Board, however, considers that such an interpretation would be contrary to the skilled person's understanding. With that interpretation, the whole structure of the claim with the distinction between first and second signals, electrodes, frequency ranges and target locations would be pointless. Hence, it is the Board's current position that the meaning of these features referring to first and second electrodes actually means that the claimed system is enabled to address the first and second electrodes separately, i.e. to include features ensuring that signals are not automatically distributed to all electrodes together.*

*7. With regard to the wording "electrodes", the Board addresses further interpretation aspects:*

*(a) "Electrodes" seems to mean "contacts", i.e. a plurality of contacts on a lead body (as in Figures 20 and 21 of the patent specification) embodies a plurality of electrodes.*

(b) The plural "electrodes" might be realised as, at least, two mono-polar electrodes, but also as, at least, a (single) pair of bi-polar electrodes.

(c) Further, it is the Board's understanding that some (but not all) of the electrodes could be part of the first electrodes and of the second electrodes, for instance in constellations where the first signals are applied between a first electrode and a common ground electrode and the second signals are applied between a second electrode and the same common ground electrode.

(d) In addition, there is no further specification about the first and second target regions. It is the Board's understanding that, due to the size of the first and second electrodes, they are necessarily configured to be positioned proximate to different (first and second) target regions.

8. With regard to the definition of the controller and the frequency ranges, it is the Board's current interpretation that directing signals with a single frequency within the respective ranges would embody the claimed subject-matter. It does not seem to be necessary that the controller be adapted to direct signals from the respective complete ranges to the respective electrodes.

9. However, the Board interprets the claimed frequency ranges as meaning that,

*for signals with a broad frequency spectrum, the complete spectrum has to be in the defined range.*

*10. The source of the first and second signals is not defined. It is not necessarily the controller that generates them.*

*11. There is also no definition, in the claim, of the relative timing of the first and second signals. They might be applied with an overlap, simultaneously, consecutively, or totally independently from each other.*

*Main request - Article 100(c) EPC,  
extension of subject-matter*

*12. Original claim 25 and original paragraph [0018] were cited as the basis for claim 1 as granted (cf. proprietor's submission in opposition proceedings dated 26 August 2016, sections 4.1.1 to 4.1.3) with additional amendments that inter alia replaced "first electrical signal delivery device" and "second electrical signal delivery device" with "first electrodes" and "second electrodes", respectively.*

*13. In the Board's view, with these amendments, the system of claim 1 now encompasses systems that were not originally disclosed - as pointed out by the opponents. In particular, neither a*

*single lead (understood as being a signal delivery device) with both - the first and second - electrodes and corresponding first and second target regions nor electrodes without any support that could be directly coupled to the controller were originally disclosed. Hence, this amendment extends beyond the content of the application as filed (Article 100(c) EPC).*

*[...]*

*Auxiliary request*

*41. In the claim set of the auxiliary request only claim 13 is amended in order to overcome the possible objection discussed above with regard to the removal of the word biphasic.*

*42. Since this amendment does not address any of the other objections against the main request discussed above, these objections equally apply to the auxiliary request.*

XII. After notification of this communication, the proprietor submitted with letter of 23 January 2024:

*[...]*

*The patent proprietor hereby withdraws its request for oral proceedings in connection with this appeal matter.*

*The patent proprietor will not attend the oral proceedings that are scheduled for 5 March 2024, though we understand that the oral proceedings may nevertheless continue in our absence.*

*[...]*

XIII. On the cover template (EPO Form 1038) for this submission, it was stated:

*[...]*

Annotations

*Letter dealing with oral proceedings ...*

*1. Remark (Annotate)*

*If refusal of the application is contemplated, at any stage, then we request the appointment of oral proceedings.*

*[...]*

XIV. No substantive submission was made, by any of the parties, subsequent to the Board's communication.

XV. The oral proceedings were cancelled.

## Reasons for the Decision

1. The communication, as reproduced above in the relevant parts, expressed and explained the Board's preliminary opinion, *inter alia*, that claim 1 of the main and auxiliary requests was amended in such a way that added subject-matter (Articles 100(c) and 123(2) EPC) extending beyond the content of the application as filed.
2. No party contested or otherwise commented on the preliminary opinion. They all had the opportunity of doing so.
3. The Board does not see any reason to depart from its preliminary opinion.
4. Therefore, the Board concludes that the amendments made to claim 1 of both requests introduce subject-matter which extends beyond the content of the application as filed. This means that neither request is allowable.
5. The proprietor withdrew their request for oral proceedings with the submission of 23 January 2024. The remark in EPO Form 1038 is not relevant because
  - (a) the wording "refusal of the application" does not apply in opposition or opposition appeal proceedings; and
  - (b) the specificity of the proprietor's wording (see point XII., above) leaves no doubt as to their intentions.
6. The condition for the opponents' requests for oral proceedings is not met.

7. Consequently, the oral proceedings were cancelled and the decision handed down in written procedure (Article 12(8) RPBA 2020).

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chair:



D. Meyfarth

P. Scriven

Decision electronically authenticated