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ALPHATEC HOLDINGS, INC. AND ALPHATEC SPINE, INC.

18 **UNITED STATES DISTRICT COURT**

19 **SOUTHERN DISTRICT OF CALIFORNIA – SAN DIEGO DIVISION**

20 NUVASIVE, INC., a Delaware
21 corporation,

22 Plaintiff,

23 v.

24 ALPHATEC HOLDINGS, INC., a
25 Delaware corporation, and
ALPHATEC SPINE, INC., a
California corporation,

26 Defendants.

Case No. 18-CV-00347-CAB-MDD

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS’ MOTION FOR FEES
AND COSTS**

Judge: Hon. Cathy Ann Bencivengo
Courtroom: 4C

PER CHAMBERS RULES, NO ORAL
ARGUMENT UNLESS SEPARATELY
ORDERED BY THE COURT

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I. INTRODUCTION

At close of business on Friday, December 6, 2019, NuVasive, by and through its counsel, Wilson Sonsini Goodrich & Rosati P.C. and Hilgers Graben PLLC, filed a motion asking this Court to publicly censure and disqualify Alphatec's outside counsel and Alphatec's General Counsel. (Doc. No. 218.) NuVasive's motion was filed in violation of the local rules, nearly two years into this case, two weeks before discovery was set to close (with key depositions occurring within one week), and just over one month before dispositive motions were due. The timing of NuVasive's motion was intentional and disruptive. NuVasive's decision to wait until the final stretch of discovery caused maximum distraction, even though NuVasive claimed Alphatec's alleged misdeeds dated back to the case's inception. (Doc. No. 218 at 17.) And the consequences of NuVasive's motion, were it to have been granted, cannot be understated – Alphatec would have been forced to replace its outside counsel years into the litigation and a few months before trial, and turn over its otherwise privileged communications to a Special Master for review and judgment. The cost to Alphatec would have been tremendous, and Alphatec would have been severely and unfairly disadvantaged in this and other litigations against NuVasive.

But, after a thorough review, the Court denied NuVasive's motion, determined it was meritless and frivolous, and authorized Alphatec to file a motion to recover its fees and costs expended in response. (Doc. No. 232.) After unsuccessfully attempting to informally reach agreement and seek monetary recovery from NuVasive, Alphatec now moves the Court and respectfully submits its fees and costs expended to respond to NuVasive's motion.

II. BACKGROUND

On December 6, 2019, NuVasive, by and through its counsel, Wilson Sonsini Goodrich & Rosati P.C. and Hilgers Graben PLLC, filed an *Ex Parte* Motion for Protective Order and Appointment of Special Master. (Doc. No. 218.) In its 300+ page motion, NuVasive charged Alphatec's counsel and Alphatec's General Counsel with

1 violations of various contractual and ethical obligations based on 1) the false claim that
2 Alphatec’s outside counsel and Alphatec’s Executive Vice President, Clinical Strategies
3 were texting each other NuVasive’s confidential and privileged information during a
4 deposition, solely because the two women were (allegedly) seen using their phones at
5 the same time, and 2) Alphatec’s counsel asking a current NuVasive employee three
6 innocuous questions during that deposition, about his duties and responsibilities. (Doc.
7 No. 218 at 19-22, Doc. No. 218-18.)

8 Based on that conduct, NuVasive demanded, almost two years into the litigation
9 and at a critical time in the case, that the Court enter “a protective order *prohibiting the*
10 *Former NuVasive Employees from disclosing any of NuVasive’s Protected*
11 *Information to Alphatec or its counsel, prohibiting Alphatec’s counsel from*
12 *communicating ex parte with the Former NuVasive Employees on any matter related*
13 *to this litigation, and prohibiting Alphatec’s counsel from representing any of the*
14 *Former NuVasive Employees* in any matter related to this litigation.” (Doc. No. 218
15 at 2.) The Former NuVasive Employees at issue included Alphatec’s General Counsel
16 and Chairman and CEO. NuVasive also demanded that “all communications” between
17 Alphatec’s counsel and/or General Counsel and certain former NuVasive employees be
18 turned over to a Special Master for review and judgment. (Doc. No. 218 at 36.)

19 After receiving NuVasive’s motion (which was filed without any notice
20 whatsoever), Alphatec and its counsel immediately began to formulate a response.
21 NuVasive’s motion required Alphatec’s immediate and exclusive attention because, had
22 it been granted, the consequences would have been both broad and severe.

23 First, as the Court recognized, Alphatec’s current counsel would have been
24 disqualified for mishandling privileged information and violating various ethical
25 obligations—a serious charge for any lawyer to carry forward. (Ex. 1, 12/12/2019 Mot.
26 Hr’g Tr. at 4-5, 13.)

27 Second, otherwise privileged communications regarding the litigation between
28 Alphatec’s counsel and certain former NuVasive employees now at Alphatec, including

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