

1 NIMALKA R. WICKRAMASEKERA (SBN: 268518)  
nwickramasekera@winston.com  
2 DAVID P. DALKE (SBN: 218161)  
ddalke@winston.com  
3 LEV TSUKERMAN (SBN: 319184)  
ltsukerman@winston.com  
4 WINSTON & STRAWN LLP  
333 S. Grand Avenue  
5 Los Angeles, CA 90071-1543  
Telephone: (213) 615-1700  
6 Facsimile: (213) 615-1750

7 BRIAN J. NISBET (*Pro Hac Vice*)  
bnisbet@winston.com  
8 SARANYA RAGHAVAN (*Pro Hac Vice*)  
sraghavan@winston.com  
9 WINSTON & STRAWN LLP  
35 West Wacker Drive  
10 Chicago, IL 60601-9703  
Telephone: (312) 558-5600  
11 Facsimile: (312) 558-5700

12 CORINNE STONE HOCKMAN (*Pro Hac Vice*)  
chockman@winston.com  
13 WINSTON & STRAWN LLP  
1111 Louisiana Street, 25<sup>th</sup> Floor  
14 Houston, TX 77002-5242  
Telephone: (713) 651-2600  
15 Facsimile: (713) 651-2700

16 Attorneys for Defendants  
ALPHATEC HOLDINGS, INC. AND ALPHATEC SPINE, INC.  
17

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

26 Defendants.  
27  
28

**Case No. 3:18-CV-00347-CAB-MDD**

[Assigned to Courtroom 4C – Honorable  
Cathy Ann Bencivengo]

**DEFENDANTS’ REPLY IN SUPPORT  
OF MOTION FOR FEES AND COSTS**

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

**TABLE OF CONTENTS**

**Page**

I. INTRODUCTION ..... 1

II. ARGUMENT..... 1

    A. Alphatec’s Hours Are Reasonable ..... 1

        1. Alphatec’s Team Was Appropriately Staffed..... 2

        2. Alphatec’s Time Was Reasonable ..... 3

    B. Alphatec’s Rates Are Reasonable ..... 7

    C. The Circumstances Justify Alphatec’s Fees and Costs..... 9

III. CONCLUSION ..... 10

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Daimler AG v. A-Z Wheels LLC*,  
No. 16cv875-JLS-MDD, 2018 WL 3413863 (S.D. Cal. Apr. 23, 2018) ..... 6

*Democratic Party of Washington State v. Reed*,  
388 F.3d 1281 (9th Cir. 2004) ..... 3, 4

*Flowrider Surf, Ltd v. Pacific Surf Designs, Inc.*,  
No. 15cv1879-BEN(BLM), 2017 WL 2212029 (S.D. Cal. May 18,  
2017) ..... 7

*Grain v. Trinity Health*,  
No. 03–72486, 2009 WL 3270584 (E.D. Mich. Oct. 5, 2009)..... 7

*Matlink, Inc. v. Home Depot U.S.A., Inc.*,  
No. 07cv1994–DMS (BLM), 2008 WL 8504767 (S.D. Cal. Oct. 27,  
2008) ..... 7

*Midamines Sprl Ltd. v. KBC Bank NV*,  
No. 12-cv-8089(RJS), 2016 WL 1071028 (S.D.N.Y. Mar. 16, 2016)..... 7

*Mogck v. Unum Life Ins. Co. of Am.*,  
289 F. Supp. 2d 1181 (S.D. Cal. 2003) ..... 4

*Redding v. ProSight Specialty Mgmt. Co.*,  
90 F. Supp. 3d 1109 (D. Mont. 2015) ..... 7

*Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*,  
No. 10–CV–0541–GPC (WVG), 2014 WL 6851612 (S.D. Cal. Dec. 3,  
2014) ..... 6, 7

## I. INTRODUCTION

On the evening of December 6, 2019, NuVasive filed a strategically-timed, bad-faith motion to disqualify Alphatec’s counsel, deprive Alphatec witnesses from the right to counsel, and order Alphatec to turn over its privileged communications to the Court. As Alphatec previously noted, NuVasive’s motion demonstrated a pattern of bad-faith conduct in this case and a continued effort to harass Alphatec and drive up litigation costs. (Doc. No. 225.) And as the Court found, NuVasive did not have one iota of evidence to support its accusations, just “suspicious” “concerns” and “uncomfortable feeling(s).” (Doc. No. 254-3 at 15.) Instead of acknowledging its bad-faith conduct, NuVasive now asks this Court to arbitrarily cut Alphatec’s fees and costs by a full two-thirds. In support, NuVasive argues the Court was wrong to say NuVasive moved to disqualify Alphatec’s counsel, and blames Alphatec for doing all it needed to respond to a surprise motion alleging serious ethical violations. (Doc. No. 266 at 7–13, 18–19.) NuVasive’s response is equally without basis. First, NuVasive argues that Alphatec spent too much time responding to NuVasive’s 300+ page motion because NuVasive deliberately filed it *ex parte* to force Alphatec to have less than one week to respond. Notably, NuVasive does not tell this Court how long it spent writing its motion—which took one full month. Second, NuVasive argues that Alphatec’s counsel’s fees are not market and criticizes the number of outside counsel who attended the hearing on behalf of Alphatec (despite it being the same number that attended for NuVasive). Again, NuVasive does not tell this Court its own outside counsel rates from a comparable firm. NuVasive should not benefit from the damage caused by its baseless motion—by substantially reducing Alphatec’s fees and costs, NuVasive will have achieved its malicious purpose for bringing the motion in the first place. Accordingly, Alphatec respectfully requests that the Court award Alphatec its actual costs and fees.

## II. ARGUMENT

### A. Alphatec’s Hours Are Reasonable

NuVasive has two basic complaints regarding Alphatec’s hours. (Doc. No. 266

1 at 7–13.) First, NuVasive claims Alphatec used too many lawyers to oppose  
2 NuVasive’s motion. (*Id.* at 4–5, 7–13.) Second, NuVasive asserts Alphatec’s senior  
3 lawyers did low-level tasks and duplicated work. (*Id.*) As such, NuVasive arbitrarily  
4 argues a full two-thirds of the work Alphatec’s senior lawyers did was ***unreasonable***  
5 ***and cannot be recovered***. NuVasive’s contentions are not supported by the law or facts,  
6 and accepting them rewards NuVasive for filing its meritless motions.

### 7 1. Alphatec’s Team Was Appropriately Staffed

8 NuVasive’s argument rings hollow considering that NuVasive’s disqualification  
9 motion was prepared and signed by ***five partners*** and ***five associates*** from ***two different***  
10 ***law firms***, Wilson Sonsini Goodrich & Rosati and Hilgers Graben PLLC.<sup>1</sup> (Doc. No.  
11 218.) And NuVasive inexplicably argues that it was ***unreasonable*** for Alphatec to have  
12 three lawyers appear at the hearing on NuVasive’s motion (Doc. No. 266 at 8–10, 18),  
13 when NuVasive itself had ***three partners*** from ***two law firms***, one of which is based in  
14 Lincoln, Nebraska, appear as well. (Doc. No. 254-3 at 3.) Indeed, ***two lead counsel***—  
15 Paul Tripodi and Mike Hilgers—argued for NuVasive. (*Id.*) NuVasive’s argument that  
16 Alphatec’s team is unreasonably overstaffed lacks any credibility.

17 Further, as shown in Alphatec’s invoice, which NuVasive mischaracterizes to  
18 avoid the consequences of its filing, six attorneys, not nine, and two paralegals, not  
19 three, almost exclusively prepared Alphatec’s opposition. (*Compare* Doc. No. 254-4 at  
20 8 *with* Doc. No. 266 at 8.) The team consisted of Alphatec’s lead counsel Ms.  
21 Wickramasekera, one partner (Mr. Nisbet), and one of counsel (Mr. Dalke). Another  
22 partner, whom NuVasive cites often to mislead the Court into believing that “four  
23 partner-level attorneys” led Alphatec’s opposition, was ***briefly consulted***, to the tune of  
24 ***3.7 total hours***, because she (and not the litigation team) specializes in the labor and  
25 employment issues that NuVasive made central to its motion. (Doc. No. 266 at 8, 12,  
26 15.) Alphatec also relied on one fourth-year associate, two first-year associates, and

27 \_\_\_\_\_  
28 <sup>1</sup> NuVasive removed several names from its signature block on this opposition to make  
it seem as though NuVasive is staffed leanly compared to Alphatec. (*Compare* Doc.  
No. 218 at 43 *with* Doc. No. 266 at 22.) It indisputably is not

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.