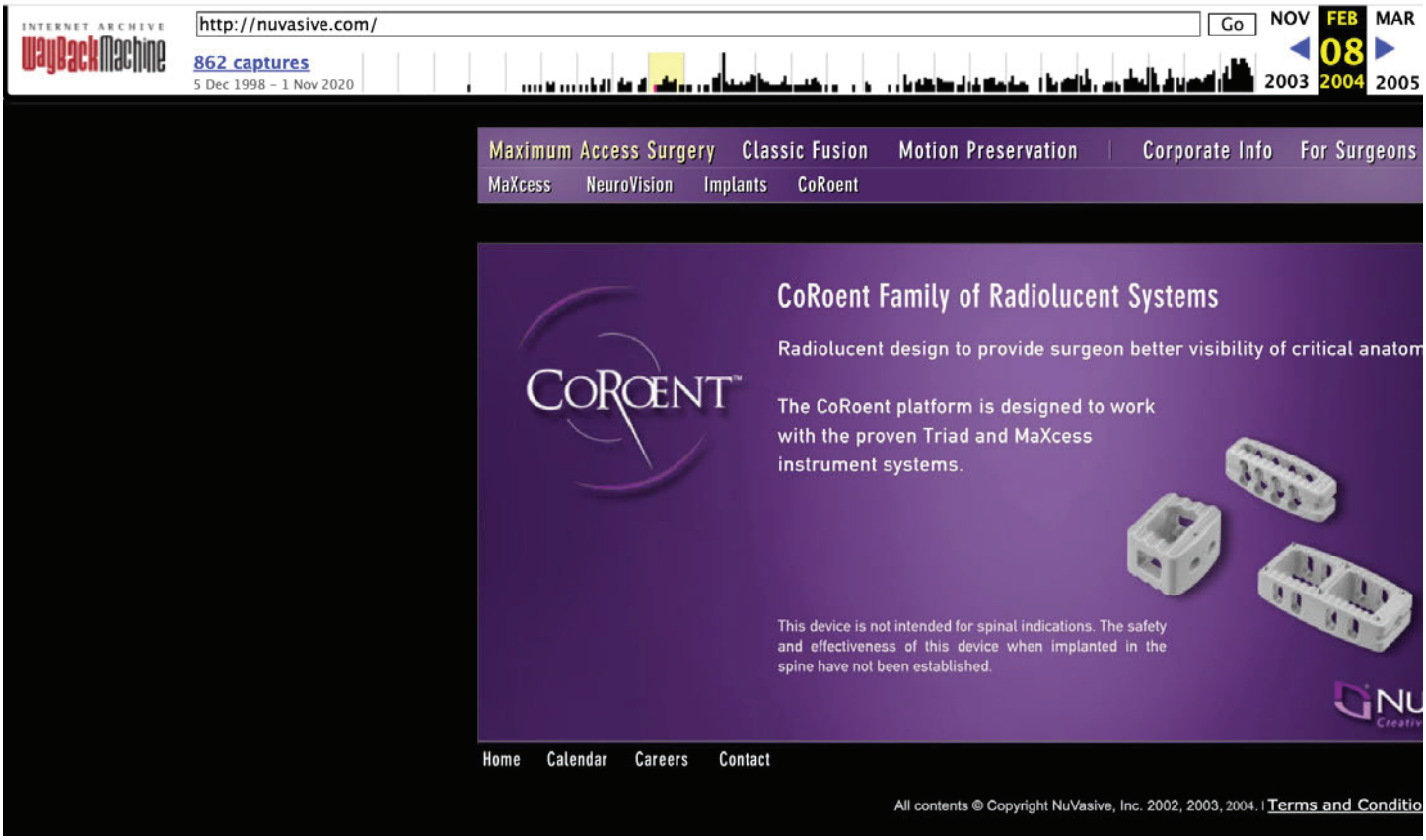
EXHIBIT 20

From: Dashe, Christina <cdashe@wsgr.com>
Sent: Friday, November 6, 2020 3:15 PM
To: Hockman, Cori S.; Tripodi II, Paul; WSGR - NUVA/ATEC; NuVa-HG
Cc: Nisbet, Brian; Wickramasekera, Nimalka; Alphatec Service
Subject: Re: NUVA/ATECIP - ATEC Invalidity Positions

Counsel,

We disagree that Alphatec is not estopped from raising its on-sale bar arguments with respect to NuVasive's alleged prior sales/use. In particular, a simple search of the Wayback Machine shows that NuVasive's publicly disclosed its embodying implants on its website no later than February 2004:



https://web.archive.org/web/20040208224016/http://nuvasive.com/

Thus, Alphatec reasonably could have relied on this publication in its IPRs, and it should be estopped. *See* MPEP § 2128, II.E.; 35 U.S.C. § 315(e)(2).

We further disagree that Alphatec can somehow now assert that the implant patent claim terms are indefinite given the fulsome discussion and agreement of the terms' meanings during the IPRs.

Finally, NuVasive understands from your email below that Alphatec will not assert invalidity in view of the Brantigan and Frey devices.

Accordingly, given the fast-approaching deadlines for the parties' validity-related expert reports, please promptly confirm that Alphatec will agree to drop its on-sale bar/public use and indefiniteness invalidity arguments. Otherwise, NuVasive intends to seek relief from the Court.

Regards,

Christina

From: "Hockman, Cori S." <CHockman@winston.com>
Date: Sunday, November 1, 2020 at 3:48 PM
To: "Tripodi II, Paul" <ptripodi@wsgr.com>, WSGR - NUVA/ATEC <nuva/atec@wsgr.com>, NuVa-HG <NuVa-HG@hilgersgraben.com>
Cc: "Nisbet, Brian" <BNisbet@winston.com>, "Wickramasekera, Nimalka" <NWickramasekera@winston.com>, Alphatec Service <AlphatecService@winston.com>
Subject: RE: NUVA/ATECIP - ATEC Invalidity Positions

[External]
Paul,

Thank you for providing your reasoning regarding NuVasive's estoppel position. Alphatec disagrees with NuVasive's arguments and characterizations provided and addresses each in turn below. Alphatec also disagrees with NuVasive's approach because it bypasses the Court's stated procedures for parties seeking such relief. Instead, NuVasive should file its request through a Motion to Strike Alphatec's Preliminary Invalidity Contentions and Alphatec should be provided a full opportunity to respond. Accordingly, Alphatec will not agree to bypass the Court's procedures or submit a joint request for status conference to address this issue.

1. As an initial matter, Alphatec is not estopped from raising arguments under 35 U.S.C. § 315 because Alphatec could not have raised on-sale bar or public use arguments related to NuVasive's prior sales before the P.T.A.B. during its IPR. *See* 35 U.S.C. § 311(b); The Sedona Conference, Commentary on Patent Litigation Best Practices: Parallel USPTO Proceedings 35 (Oct. 2016) (Bencivengo, J., judicial advisor) ("[A]ny grounds based on §§ 101 and 112 or any grounds based on public use, prior sale, or prior invention under §§ 102 and 103 remain intact for assertion in concurrent or subsequent district court litigation or USITC proceedings.") *available at* https://www.lw.com/thoughtLeadership/commentary-on-patent-litigation-best-practices. Thus, Alphatec is not estopped from bringing its on-sale bar and public use arguments regarding NuVasive's implants.

    a. While we note that you now admit that your product was used publicly before March 2004, the document on which NuVasive relies to argue that Alphatec is foreclosed from bringing its on-sale bar and/or public use argument is not a printed publication. It is well settled by the Federal Circuit that to be a printed publication, a document must be publicly accessible. *See In re Klopfenstein*, 380 F.3d 1345, 1348 (Fed. Cir. 2004). That is not the case here with the document NuVasive cites (NUVA_ATEC0115139) that it also designated Highly Confidential – Outside Attorney's Eyes Only, which is a list of post-launch surgeon trainings performed for the MaXcess XLIF-90. As Alphatec was limited in its IPR to patents and printed publications (35 U.S.C. § 311(b)), it could not have raised or relied on NUVA_ATEC0115139 before the P.T.A.B.

2. Regarding the indefiniteness argument, Alphatec was not required to raise its invalidity defense of indefiniteness at the claim construction stage, especially where claim construction does not resolve the dispute. *Compare* Patent L.R. 3.3 (requiring grounds of invalidity based on indefiniteness to be included in Invalidity Contentions) *with* Patent L.R. 4 (not requiring parties to raise or identify terms they contend are indefinite). In any case, Alphatec put NuVasive on notice in its preliminary claim construction charts and responsive charts that the term "a position proximate to said medial plane" from the '156 patent and the terms

"generally parallel," "central region," and "positioned in said central region" from the '334 patent were indefinite. Moreover, Alphatec was precluded from raising indefiniteness arguments under § 112 in its IPR and cannot be estopped from doing so now. 35 U.S.C. § 311(b). Neither the PTAB nor the parties came to any agreement with respect to the claim terms that Alphatec contends are indefinite. Instead, Alphatec stated in its petition that there "no express construction is needed ***to resolve the issues in this Petition***." Alphatec Holdings, Inc. v. NuVasive, Inc., IPR 2019-00361, Paper 2 at 26 (P.T.A.B. Dec. 21, 2018). The P.T.A.B. agreed. E.g., Alphatec Holdings, Inc. v. NuVasive, Inc., IPR 2019-00361, Paper 59 at 19 (P.T.A.B. July 8, 2020) ("Accordingly, we do not need to provide express claim interpretations for any claim term."). As stated, indefiniteness was not an issue Alphatec could raise in its Petition for Inter Partes Review; instead, it raised only obviousness challenges to the Implant Patents-in-Suit. These issues have not been addressed in either the litigation or before the PTAB during the IPR proceedings.

As to Brantigan and Frey, in the interest of reducing the issues for trial, Alphatec will agree to not pursue 102(b) defenses based on these references at this time. Please note that this agreement is made without prejudice and pending the Federal Circuit's resolution of the IPR appeals. Nevertheless, Alphatec is otherwise entitled to rely on these devices and references at trial because they are relevant to other issues in this case, for example, lost profits and non-infringing alternatives. In any case, estoppel does not apply to the Brantigan and Frey devices. *See Star Envirotech, Inc. v. Redline Detection, LLC*, No. SACV 12-01861 JGB, 2015 WL 4744394, at *4 (C.D. Cal. Jan. 29, 2015) ("However, the Leakmaster itself, if disassembled, could shed light on whether it practices this claim limitation."); *see also Contour IP Holding, LLC v. GoPro, Inc.*, No. 3:17-cv-04738-WHO, 2020 WL 109063, at *5 (N.D. Cal. Jan. 9, 2020) ("It is clear that GoPro could not have raised systems or products as part of IPR, during which challenges are limited to patents or printed publications."); *Polaris Indus., Inc. v. Arctic Cat Inc*, No. 15-4475, 2019 WL 3824255, at *3 (D. Minn. Aug. 15, 2019) ("Other courts, and this Court agrees, have held that products embodying patents or printed publications are not subject to § 315(e)(2) estoppel").

Thanks,
Cori

Cori S. Hockman
Associate Attorney
Winston & Strawn LLP
D: +1 713-651-2746
winston.com

Begin forwarded message:

From: "Tripodi II, Paul" <ptripodi@wsgr.com>
Date: October 26, 2020 at 6:18:17 PM CDT
To: "Nisbet, Brian" <BNisbet@winston.com>
Cc: "Wickramasekera, Nimalka" <NWickramasekera@winston.com>, WSGR - NUVA/ATEC <nuva/atec@wsgr.com>, NuVa-HG <NuVa-HG@hilgersgraben.com>
Subject: NUVA/ATECIP - ATEC Invalidity Positions

Brian,

As you requested, the following is a short summary of the estoppel issues raised by ATEC's Preliminary Invalidity Contentions along with a short statement of the reasons that they are improper in light of the IPR proceedings.

As you know, NuVasive would like to raise these estoppel issues in a *Joint Request for a Status Conference*, so that the parties can get input from the Court and potentially avoid any unnecessary expense in addressing these claims in discovery. **Please let us know if Alphatec will work with us in exchanging short position statements in connection with the filing of the proposed request.**

1. Alphatec is estopped under 35 USC 315(e) from asserting its 102(b) arguments because Alphatec "raised or reasonably could have raised" them in its IPRs.

    a. During IPR, Alphatec relied on the Brantigan and Frey ***devices*** as corroborating evidence of the disclosures of the Brantigan and Frey patents. Thus, Alphatec acknowledged that the relevant features of the Brantigan/Frey devices in its Invalidity Contentions were described in the patents it actually "raised" during IPR. *See, e.g.*, *Vaporstream, Inc. v. Snap Inc*., 2020 WL 136591 at *23 (C.D. Cal. January 13, 2020).

    b. Months before Alphatec filed its IPR, Alphatec knew and had notice that NuVasive's embodying products were disclosed/used before March 29, 2004. *See* NuVasive's October 22, 2018 response to Alphatec's interrogatory requesting the "launches, and earliest disclosure, use, and sale of the inventions of the asserted claims of the patents-in-suit" (disclosing NUVA_ATEC01115139). Thus, given that there are multiple pre-March 29, 2004 "printed publications" depicting NuVasive's embodying products, Alphatec "reasonably should have raised" these publications in its IPR.

2. With respect to the indefiniteness arguments in Alphatec's PICs, not only did Alphatec affirmatively choose not to bring these arguments during claim construction, the parties and the PTAB clearly came to an agreement regarding the meaning of ***each*** of these terms during IPR. Accordingly, these issues have been addressed in both the litigation and the IPR proceedings. Alphatec should not now be permitted to assert that these terms are somehow indefinite. Guardant Health, Inc. v. Found. Med., Inc., Civil Action No. 17-1616-LP S-CJB, 2019 U.S. Dist. LEXIS 190398, at *24 (D. Del. Nov. 1, 2019)

Thanks,

Paul

WILSON SONSINI

Paul D. Tripodi II | Member | Wilson Sonsini Goodrich & Rosati

633 West Fifth St., Suite 1550 | Los Angeles, CA 90071 | direct: 323.210.2902 | mobile: 213.344.9071 | ptripodi@wsgr.com

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