

1 **WILSON SONSINI GOODRICH & ROSATI P.C.**
 2 PAUL D. TRIPODI II (SBN 162380)
 3 ptripodi@wsgr.com
 4 WENDY L. DEVINE (SBN 246337)
 5 wdevine@wsgr.com
 6 NATALIE J. MORGAN (SBN 211143)
 7 nmorgan@wsgr.com
 8 633 West Fifth Street, Suite 1550
 9 Los Angeles, CA 90071
 10 Telephone: 323-210-2900
 11 Fax: 866-974-7329

7 **Hilgers Graben PLLC**
 8 MICHAEL T. HILGERS (*Pro Hac Vice*)
 9 mhilgers@hilgersgraben.com
 10 575 Fallbrook Blvd, Suite 202
 11 Lincoln, NE 68521
 12 Telephone: 402-218-2106
 13 Fax: 402-413-1880

14 *Attorneys for Plaintiff NuVasive, Inc.*

15 UNITED STATES DISTRICT COURT
 16 SOUTHERN DISTRICT OF CALIFORNIA
 17 SAN DIEGO DIVISION

<p>15 NUVASIVE, INC., a Delaware 16 corporation, 17 Plaintiff, 18 v. 19 ALPHATEC HOLDINGS, INC., a 20 Delaware corporation, and ALPHATEC 21 SPINE, INC., a California corporation, 22 Defendants.</p>	<p>) Case No. 18-cv-00347-CAB-MDD)) NUVASIVE, INC.’S REPLY IN) SUPPORT OF MOTION TO) STRIKE ALPHATEC’S) INVALIDITY CONTENTIONS))) PER CHAMBERS RULES, NO) ORAL ARGUMENT UNLESS) SEPARATELY ORDER BY THE) COURT)) Judge: Hon. Cathy Ann Bencivengo) Courtroom -4C</p>
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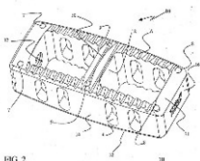
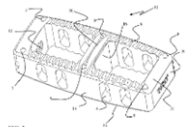


1 **I. INTRODUCTION**

2 Since the beginning of the litigation Alphatec’s various invalidity
 3 contentions unequivocally alleged the existence of “publicly available materials”
 4 describing **NuVasive implants** that “may . . . qualify as prior art under one or more
 5 sections of 35 U.S.C. § 102.” Despite Alphatec’s stated intention to assert this
 6 defense (and that it knew of publicly available materials), it provides no evidence
 7 that it conducted a diligent search for these materials. And, despite its assurances
 8 that the *inter partes* review would streamline the litigation, Alphatec then failed to
 9 raise these materials in any form before the PTAB. Alphatec’s inexplicable
 10 decision not to raise this prior art argument before the PTAB has resulted in
 11 significant inefficiencies as the priority date and sufficiency of the references
 12 would have already been resolved. This Court should hold that Alphatec is
 13 estopped pursuant to 35 U.S.C. § 315(e)(2) from simply re-labeling these
 14 arguments as an on-sale bar argument.

15 **II. TIMELINE RELATING TO ALPHATEC’S SECTION 102(B)
 16 CONTENTION**

17 In these post-IPR proceedings, Alphatec asserts that activities taking place
 18 prior to March 29, 2004, should invalidate the implant patents because NuVasive is
 19 **not** entitled to its priority date of its *provisional* patent application. Importantly,
 20 Alphatec has not alleged that any pre-March 2003 activities took place. Without
 21 its priority date argument, Alphatec has no § 102(b) invalidity defense.

<p>Critical Date March 29, 2003</p> <p>One year prior to the filing date of the Provisional Patent Application</p>	<p style="text-align: center;">< ----- 1 Year Grace Period ----- ></p>  <p style="text-align: center;">February 8, 2004 Wayback Machine Image with Enlarged Image of Implant</p>	<p>March 29, 2004 Provisional Patent Filed</p>  <p style="text-align: center;">FIG. 2</p>	<p>March 29, 2005 Formal Utility Patent Filed</p>  <p style="text-align: center;">FIG. 2</p>
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