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18	UNITED STATES DISTRICT COURT				
19	SOUTHERN DISTRICT OF CALIFORNIA - SAN DIEGO DIVISION				
20	NUVASIVE, INC., a Delaware corporation,	Case No. 18-CV-00347-CAB-MDD			
21	Plaintiff,	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF			
22	v.	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT			
2324	ALPHATEC HOLDINGS, INC., a Delaware corporation and ALPHATEC SPINE, INC., a	Judge: Hon. Cathy Ann Bencivengo			
25	ALPHATEC SPINE, INC., a California corporation,	Courtroom: 4C			
26	Defendants.	PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT			
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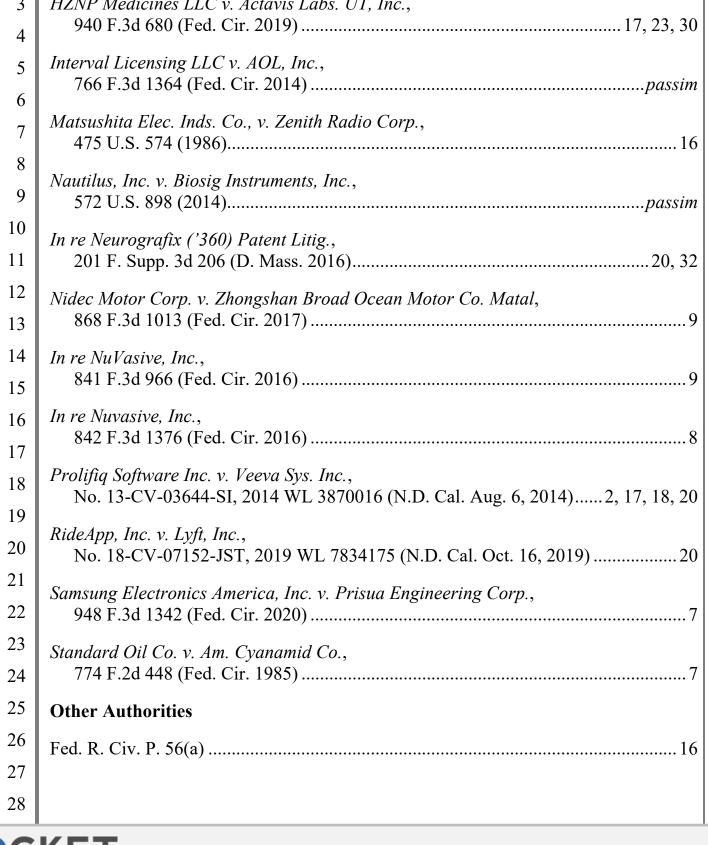
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I. INTRODUCTION

Alphatec moves for summary judgment that the asserted claims of U.S. Patent Nos. 8,187,334 and 8,361,156 are invalid as indefinite.

The '334 and '156 patents are related and share the same specification. Both patents claim a spinal fusion implant having certain dimensions and radiopaque markers placed in certain locations in the implant. Alphatec challenges the definiteness of three terms. First, all asserted claims of the '156 patent require radiopaque markers that extend into the sidewalls of the implant "at a position proximate to said medial plane." Second, all asserted claims of the '334 patent require radiopaque markers that are positioned in the "central region" which is "generally centrally" located in the implant. Third, one asserted claim of the '334 patent additionally requires the implant be "approximately 18 mm" wide.

As confirmed by the testimony of NuVasive's expert, Dr. Youssef, all asserted claims are indefinite as a matter of law because none "inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). Dr. Youssef—a surgeon who claims to be the most knowledgeable person remaining at NuVasive and who has submitted thousands of pages of testimony regarding these patents in this proceeding and before the Patent Trial & Appeal Board ("PTAB")—confirmed under oath that determining whether each of the three challenged terms is met in the context of these patents and for purposes of infringement is a "subjective analysis" that will vary from surgeon to surgeon. Ex. 12¹ (Youssef Dep. Tr.) at 102:3–12 ("I don't think there is an objective boundary.") ("at a position proximate to said medial plane" term); Ex. 13 (Youssef Dep. Tr.) at 79:7–80:20 ("So I don't know that there is objective. It's more subjective; right? . . . I think you have to be somewhat subjective in recognizing that that is truly within the scope of claim language") ("central region" term); Ex. 14 (Youssef Dep. Tr.)

¹ All exhibits are to the Declaration of Brian J. Nisbet In Support of Defendants' Motion for Summary Judgment filed concurrently herewith.

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