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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

NUVASIVE, INC., a Delaware corporation, Plaintiff, v. ALPHATEC HOLDINGS, INC., a Delaware corporation, and ALPHATEC SPINE, INC., a California corporation, Defendants.	CASE NO.: 18-cv-00347-CAB-MDD **PLAINTIFF NUVASIVE, INC'S OBJECTIONS TO DECLARATION OF MATT CURRAN IN SUPPORT OF DEFENDANTS' OPPOSITION TO NUVASIVE, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT (IMPLANT PATENTS)** Judge: Hon. Cathy Ann Bencivengo Magistrate Judge: Mitchell D. Dembin

Plaintiff NuVasive, Inc. ("NuVasive") hereby objects to the Declaration of Matt Curran in Support of Defendants' Opposition to NuVasive, Inc.'s Motion for Partial Summary Judgment (Implant Patents). Doc. No. 306-8.

SPECIFIC EVIDENTIARY OBJECTIONS TO CURRAN DECLARATION

Statement in Curran Declaration (Doc. No. 306-8)	NuVasive's Objections
¶ 1: "I make the following statements based on personal knowledge and if called to testify to them, could and would do so."	
¶ 2: "I am the Senior Director of Technology Advancement at Alphatec Spine, Inc. ("Alphatec"). I have held this position since I joined Alphatec in December 2017. Before that, I worked for NuVasive, Inc. ("NuVasive") from May 2000 until November 2017. I was employed in a variety of research and development roles during my time at NuVasive, working as an engineer on numerous products, including, among others, NuVasive's cervical, lumbar, and interbody products. My last title before leaving NuVasive was Senior Director of Global Engineering Services."	
¶ 3: "NuVasive began developing what would become the CoRoent XL implant in early 2003. I was a lead design engineer on the CoRoent implant project. In 2003, the CoRoent implant-was-also referred to as a PEEK Cement Restrictor. "Cement Restrictor" is a regulatory term for the implant which became marketed as CoRoent. NuVasive sometimes referred to the implant as PEEK-CR. All of these names-PEEK Cement Restrictor, PEEK-CR, and CoRoent- refer to the same implant family, and PEEK Cement Restrictor XL, PEEK CR-XL, PEEK CR-X, and	

Statement in Curran Declaration (Doc. No. 306-8)	NuVasive's Objections
CoRoent XL refer to the same implant. "XL" and "X" stand for Extra Large, which NuVasive labeled all Cement Restrictor, PEEK CR, and CoRoent implants that had a length of at least 40 mm."	
¶ 4: "NuVasive tasked me with being the lead engineer for the project, and in that capacity, I led the design and development of the CoRoent implant systems. Attached here as Exhibit A is a true and correct copy of an interoffice memo I received that announced my position as the "Project Leader" of the "development engineering efforts" of the PEEK Cement Restrictor product lines. **NuVasive began developing this product because PEEK implants were available on the market at that time, but NuVasive did not yet offer PEEK implants."**	**Lack of Foundation [FRE 602]**. There is no foundation for Mr. Curran's claims regarding the reason that NuVasive began developing the CoRoent implant. As such, his testimony regarding NuVasive's motivations constitute speculation. **Impermissible Hearsay [FRE 802]**. To the extent that Mr. Curran derives his knowledge of NuVasive's reasons for developing CoRoent from conversations with other individuals at NuVasive, these are out of court statements offered to prove the truth of the matter asserted.
¶ 5: "During the development phase of the CoRoent implant, I worked both independently and solicited feedback from consulting surgeons, the most influential and significant of whom was Dr. Luiz Pimenta, **who had been developing a direct lateral procedure since 2001.** **Dr. Pimenta was the primary surgeon consultant who guided NuVasive's efforts to develop the XLIF procedure and provided concepts, parameters, goals, ideas,**	**Lack of Foundation [FRE 602]**. There is no foundation for Mr. Curran's claims regarding when Dr. Pimenta began developing a direct lateral procedure. **Lack of Foundation [FRE 602]**. There is no foundation for Mr. Curran's claims regarding Dr. Pimenta's role in developing XLIF.

Statement in Curran Declaration (Doc. No. 306-8)	NuVasive's Objections
guidance, and feedback on the XLIF instruments, including the implants."	
¶ 6: "As part of my job, I worked with Dr. Pimenta to implement his designs for the CoRoent implant. **Dr. Pimenta's main concern was designing an implant that would be stable in the disc space**. I have attached here as Exhibit B a true and correct copy of my handwritten notes and an email between Dr. Pimenta, Pat Miles, and myself that highlights some of Dr. Pimenta's contributions to the design of the implant. As illustrated in my handwritten notes, Dr. Pimenta stressed including anti-migration features in the implant *See* Ex. B at NUVA_ATEC0016561. **At the time, we were - aware of commercially available implants that were designed with ridges on the top and bottom surfaces of the implant, but Dr. Pimenta felt these designs did not fully resolve issues with the implants moving in the disc space once the implant was in its final position**. Dr. Pimenta proposed adding "spikes" to the implant to increase stabilization. *Id.* **These spikes would extend above and below the surface of the implant to grip the vertebrae and hold the implant in place in its final position in the disc space**. Dr. Pimenta also suggested that the "[t]eeth [be] more aggressive" to further increase the stability of the implant. *Id.* These anti-migration features were implemented in the design of the CoRoent implant."	**Lack of Foundation [FRE 602]**. There is no foundation for Mr. Curran's claims regarding Dr. Pimenta's concerns or motivations with respect to development of the CoRoent implant. **Impermissible Hearsay [FRE 802]**. To the extent that Mr. Curran derives his knowledge of Dr. Pimenta's concerns or motivations with respect to development of the CoRoent implant from conversations with Dr. Pimenta, these are out of court statements offered to prove the truth of the matter asserted. **Lack of Foundation [FRE 602]**. There is no foundation for Mr. Curran's statements regarding the "commercially available implants" that he and Dr. Pimenta were aware of. **Impermissible opinion testimony by lay witness [FRE 701, 702].** Mr. Curran was put forward only as a fact witness. His testimony regarding the clinical role of "teeth" and "spikes" on the surface of the implant is opinion testimony and thus impermissible. Furthermore, on their face, these opinions clearly ***are*** "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FRE 701(c). Alphatec has not disclosed Mr. Curran

Statement in Curran Declaration (Doc. No. 306-8)	NuVasive's Objections
	as an expert witness under Federal Rule of Civil Procedure 26(a)(2)(C). So even if Mr. Curran were qualified to offer these opinions, the opinions should be excluded as not properly disclosed. Fed. R. Civ. P. 37(c)(1). Alphatec has retained Dr. Sachs, a spine surgeon, as its technical expert. If Alphatec wished to put forward these opinions, it needed to do so through Dr. Sachs.
¶ 7: "While at NuVasive, I assisted in a supporting role with the company's 510(k) submissions to the U.S. Food and Drug Administration ("FDA") for the CoRoent implant. For example, I created the engineering drawings that were submitted with NuVasive's 510(k) submissions for the Cement Restrictor and CoRoent System to the FDA. I have attached here as Exhibit C a true and correct copy of my drawings submitted with NuVasive's June 2004 510(k) submission for the CoRoent System."	
¶ 8: "I also helped NuVasive formulate responses to the FDA's questions and issues that arose during that submission. I have attached here as Exhibit D a true and correct copy of an email NuVasive received on August 10, 2004 from the FDA regarding "questions and issues" that arose during the review of NuVasive's June 2004 510(k) submission for the CoRoent System and my proposed response."	

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