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15 *Attorneys for Plaintiff NuVasive, Inc.*

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

19	NUVASIVE, INC., a Delaware corporation,	)	CASE NO.: 18-cv-00347-CAB-MDD
20		)	
21	Plaintiff,	)	<b>NUVASIVE, INC'S RESPONSE</b>
22	v.	)	<b>TO DEFENDANTS' OBJECTION</b>
23	ALPHATEC HOLDINGS, INC., a Delaware corporation, and ALPHATEC	)	<b>TO NUVASIVE'S BENCH</b>
24	SPINE, INC., a California corporation,	)	<b>MEMORANDUM REGARDING</b>
25		)	<b>PRIORITY DATE RAISING NEW</b>
26	Defendants.	)	<b>SUMMARY JUDGMENT</b>
		)	<b>ARGUMENTS [DOC. NO. 323]</b>
		)	Judge: Hon. Cathy Ann Bencivengo
		)	Magistrate Judge: Mitchell D. Dembin

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1 Alphatec’s request that the Court “strike NuVasive’s new argument and case  
2 law” from NuVasive’s Bench Memorandum should be denied. Doc. No. 323 at 2.  
3 NuVasive’s Bench Memorandum does not put forward any new theories in support  
4 of its motion for summary judgment and all of the cases NuVasive cites in the  
5 Bench Memorandum are directly related to the question the Court asked the parties  
6 to address: whether the Court or a jury should decide which priority date to apply  
7 to the Implant Patents.

8 As discussed in NuVasive’s Bench Memorandum the Federal Circuit’s  
9 decision in *Yeda Rsch. & Dev. Co. Ltd. v. Abbott GmbH & Co. KG*, 837 F.3d 1341  
10 (Fed. Cir. 2016) is consistent with NuVasive’s summary judgment contentions. In  
11 addressing the priority date for a patent that contained more information about a  
12 particular limitation than was described in the priority application, the Court  
13 concluded that the priority date applied as a matter of law because the limitation in  
14 question was disclosed in the priority application. *Id.* at 1345. NuVasive noted  
15 that similar logic applies here to support the conclusion that the Court should  
16 decide the priority date question as a matter of law. Doc. No. 321 at 4. Alphatec’s  
17 flyspecking notwithstanding, this is not a “new” legal theory, but instead is the  
18 same theory NuVasive put forward in summary judgment. Doc. No. 303-1 at 40  
19 (“[B]ecause the Provisional Application describes the spike elements 7, 8, 9 as  
20 preferably being made of ‘radiopaque’ material, a skilled artisan would  
21 immediately recognize that the spike elements would serve the dual purpose of  
22 facilitating radiographic visualization.”); *id.* at 40-41 (citing testimony from  
23 Alphatec’s expert witness confirming that the sole purpose for making spikes  
24 “radiopaque” is to facilitate radiographic visualization); *id.* at 41 (“Radiopaque  
25 materials are, by definition, visible in an x-ray.”); Doc. No. 311 at 12-13.<sup>1</sup>

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27 <sup>1</sup> To be clear, NuVasive *never* argued, as Alphatec’s Objection incorrectly  
28 claims, that the claimed implant’s “radiopaque markers” are an “undisclosed yet

(continued...)

1 As for Alphatec’s charge that NuVasive’s Bench Memorandum cites “new  
2 case law on the merits of summary judgment,” it is not clear what Alphatec is  
3 complaining about. NuVasive addressed the Court’s question about whether  
4 priority date is a legal question amenable to summary judgment. Indeed, Alphatec  
5 itself cites numerous cases in its own Bench Memorandum not previously raised in  
6 its summary judgment submissions. Doc. No. 322 at 2-4.

7 In any case, the Court need not trouble itself with Alphatec’s objections.  
8 NuVasive’s arguments and legal theory in support of its motion for summary  
9 judgment on the issue of priority date *remain unchanged*: there can be no genuine  
10 dispute of fact that the provisional application discloses the claimed implant and  
11 therefore NuVasive is entitled to the March 29, 2004 priority date as a matter of  
12 law.

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26 inherent propert[y]” in the provisional application. Doc. No. 323 at 2. Rather, it has  
27 always been NuVasive’s position that by disclosing “spike elements” made of  
28 “radiopaque” material, the provisional application indisputably disclosed the  
“radiopaque marker” limitation. Doc. No. 303-1 at 40-41.

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1 Dated: April 29, 2021

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document has been served on this date to all current and/or opposing counsel of record, if any to date, who are deemed to have consented to electronic service via the Court’s CM/ECF system per Civ.L.R. 5.4(d). Any other counsel of record will be served by electronic mail, facsimile and/or overnight delivery.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed this 29th day of April 2021 at San Diego, California.

By: /s/ Arlene Apodaca  
ARLENE APODACA