

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

**PRETRIAL ORDER**

Judge: Hon. Cathy Ann Bencivengo  
Courtroom: 15A

Trial Date: January 10, 2022

1 Following pretrial proceedings pursuant to Fed. R. Civ. P. 16 and CivLR  
2 16.1.f.6.

3 **IT IS ORDERED:**

4 **I. NATURE OF THE CASE**

5 This is an action for patent infringement. Plaintiff NuVasive, Inc.,  
6 (NuVasive) alleges that Defendants Alphatec Holdings, Inc. and Alphatec Spine,  
7 Inc. (jointly Alphatec) infringe three U.S. Patents.

8 U.S. Patent No. 8,439,832

9 (which will generally be referred to as the ‘832 Patent);

10 U.S. Patent No. 7,819,801

11 (which will generally be referred to as the ‘801 Patent); and

12 U.S. Patent No. 9,974,531

13 (which will generally be referred to at the ‘531 Patent)

14 These patents relate to the field of spinal surgery, more specifically surgical  
15 access systems for the performance of spinal surgery and disk replacement  
16 procedures.

17 NuVasive owns these three patents and alleges that surgical access systems  
18 sold by Alphatec infringe these patents and that Alphatec’s infringement is willful.  
19 It is NuVasive’s burden to prove by a preponderance of the evidence that  
20 Alphatec’s accused systems infringe NuVasive’s patents and that the infringement  
21 is willful. Regarding the ‘832 Patent, there has already been a determination that  
22 Alphatec’s system infringes the asserted claims of that patent, so you, the jury, will  
23 only consider whether NuVasive proves that infringement to be willful. As to the  
24 claims of the other two patents, you the jury will decide if the claims are infringed  
25 as well as the question of willfulness. You should not infer from the determination  
26 that the ‘832 patent is infringed that the claims of the other asserted patents are also  
27 infringed. Each patent claim must be considered individually.

28

1 Alphatec denies infringement of the '801 and '531 patents and denies willful  
2 infringement of all the asserted patents. Alphatec further alleges that the asserted  
3 patents are invalid. Alphatec has the burden of proving invalidity by clear and  
4 convincing evidence.

5 NuVasive seeks damages for the alleged infringements of its patents in the  
6 form of lost profits and a reasonable royalty. NuVasive must prove its damages by  
7 a preponderance of the evidence. Alphatec denies that NuVasive is entitled to any  
8 award of damages.

## 9 II. CAUSES OF ACTION

### 10 A. NuVasive's Causes of Action

11 1. NuVasive filed its Amended Complaint for Patent Infringement [Doc.  
12 No. 110] on September 13, 2018 ("Operative Complaint") originally alleging Eleven  
13 causes of action for patent infringement.

14 2. On September 24, 2021, NuVasive provided its Final Disclosure of  
15 Patent Claims to be Asserted at Trial [Doc No. 336]. In accordance with that  
16 disclosure, the following causes of action will be tried to the jury at the January 2022  
17 trial:

- 18 • **Third Cause of Action:** Direct<sup>1</sup> and willful infringement of Claims 1, 3, 9,  
19 and 10 of the '832 Patent under 35 U.S.C. §§ 271(a);
- 20 • **First Cause of Action:** Direct and willful infringement of Claims 1, 2, 15,  
21 16, and 26 of the '801 Patent under 35 U.S.C. §§ 271(a);
- 22 • **Tenth Cause of Action:** Direct and willful infringement of Claims 1 and 39  
23 of the '531 Patent under 35 U.S.C. §§ 271(a).

24 3. All other causes of action and claims in NuVasive's Operative  
25 Complaint are hereby dismissed with prejudice.

26 4. NuVasive owns the '832 Patent and alleges that the '832 Patent is valid.  
27 NuVasive alleges that Alphatec has infringed and infringes claims 1, 3, 9, and 10 of

28 <sup>1</sup> It has been determined that Alphatec infringes claims 1, 3, 9, and 10 of the '832 patent. [Doc. No. 281 at 6.]

1 the '832 Patent (Third Cause of Action) by making, using, offering to sell, and/or  
2 selling the following Alphatec products: Alphatec's K-wire, Initial Dilator,  
3 Secondary Dilator, Squadron Lateral Retractor Body, Squadron Lateral Retractor  
4 Right Blade, Squadron Lateral Retractor Left Blade, Squadron Lateral Retractor  
5 Posterior Blade, and the 4th Blade.

6 5. NuVasive owns the '801 Patent and alleges that the '801 Patent is valid.  
7 NuVasive alleges that Alphatec has infringed and infringes claims 1, 2, 15, 16, and  
8 26 of the '801 Patent (First Cause of Action) by making, using, offering to sell,  
9 and/or selling the following Alphatec products: Alphatec's Initial Dilator, Secondary  
10 Dilator, Squadron Lateral Retractor Body, Squadron Lateral Retractor Right Blade,  
11 Squadron Lateral Retractor Left Blade, Squadron Lateral Retractor Posterior Blade,  
12 Squadron Lateral Retractor Right Handle Arm, Squadron Lateral Left Handle Arm,  
13 Intradiscal Shim, Shim Inserter and K-Wire.

14 6. NuVasive owns the '531 Patent and alleges that the '531 Patent is valid.  
15 NuVasive alleges that Alphatec has infringed and infringes claims 1 and 39 of the  
16 '531 Patent (Tenth Cause of Action) by making, using, offering to sell, and/or  
17 selling, the following Alphatec products: Alphatec's Squadron Lateral Retractor  
18 Body, the Squadron Lateral Retractor Right Blade, the Squadron Lateral Retractor  
19 Left Blade, the Squadron Lateral Retractor Posterior Blade, the Squadron Lateral  
20 Retractor Right Arm Extender, the Squadron Lateral Retractor Left Arm Extender,  
21 the Initial Dilator, the Secondary Dilator, the k-wire, the Intradiscal Shim, the  
22 Universal Clip, and the accused products additionally include "lateral implants  
23 (including Alphatec Battalion Lateral Spacer, Transcend LIF PEEK Spacer, Titec-  
24 Coated LLIF implants, and IdentiTi implants)."

25 7. As set forth in NuVasive's Complaint, NuVasive seeks monetary and  
26 equitable relief. NuVasive is seeking damages (including lost profits and/or  
27 reasonable royalty) in an amount adequate to compensate NuVasive for Alphatec's  
28 infringement, in accordance with 35 U.S.C. § 284. NuVasive is separately seeking

1 injunctive relief for future infringement. NuVasive contends that an award of  
2 ongoing royalties is inadequate to compensate NuVasive for Alphatec's  
3 infringement, and if an injunction is not awarded, NuVasive seeks an award of an  
4 ongoing royalty, including an enhanced ongoing royalty. NuVasive also seeks  
5 supplemental damages and an accounting of past damages for infringement up to the  
6 date of the payment, including pre-verdict damages, along with prejudgment and  
7 post-judgment interest. NuVasive also seeks a judgment that Alphatec's  
8 infringement was willful and an enhancement of damages due to Alphatec's willful  
9 infringement. NuVasive also seeks an award of its attorneys' fees and costs because  
10 this is an exceptional case, including due to Alphatec's willful infringement.  
11 NuVasive also seeks a declaratory judgment that Alphatec infringes all asserted  
12 claims and that each and every asserted claim is valid and enforceable. NuVasive's  
13 Complaint includes the following points of relief:

- 14 • Declaring that the Asserted Patents are valid and enforceable, and that  
15 Alphatec has infringed one or more of the elected claims of the Asserted  
16 Patents;
- 17 • Declaring that Alphatec has willfully infringed each of the Asserted  
18 Patents;
- 19 • Preliminarily and permanently enjoining Alphatec, its officers, partners,  
20 employees, agents, parents, subsidiaries, attorneys, and anyone acting in  
21 concert or participation with any of them, from further infringing, each of  
22 the Asserted Patents, in accordance with 35 U.S.C. § 283;
- 23 • Awarding NuVasive damages (in lost profits and/or reasonable royalty) in  
24 an amount adequate to compensate NuVasive for Alphatec's infringement,  
25 in accordance with 35 U.S.C. § 284;
- 26 • Awarding NuVasive treble damages based on Alphatec's willful  
27 infringement of the Asserted Patents, in accordance with 35 U.S.C. § 284;
- 28 • Awarding NuVasive attorney's fees and costs incurred by NuVasive in  
accordance with 35 U.S.C. § 285; and
- Granting such other and further relief as this Court may deem just and  
appropriate.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.