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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

**MOVANT GREGORY
LUCIER'S REPLY IN SUPPORT
OF MOTION TO QUASH OR
MODIFY TRIAL SUBPOENA**

Judge: Hon. Cathy Ann Bencivengo
Courtroom: 4C

**PER CHAMBERS RULES, NO
ORAL ARGUMENT UNLESS
SEPARATELY ORDERED BY
THE COURT**

I. INTRODUCTION

1 By Alphatec’s own admission, it has little need for Mr. Lucier’s live
2 testimony at trial. Although it initially identified Mr. Lucier as a witness on a broad
3 array of topics, it now identifies only two *potential* rebuttal topics for which it “may”
4 need his testimony—both of which it could address through Mr. Lucier’s deposition
5 testimony. Given that Mr. Lucier is no longer affiliated with NuVasive, and that he
6 resides over 700 miles away from the Court, in Aspen, Colorado, the Court should
7 find that requiring him to travel to California presents an undue burden.
8

9 Alphatec makes much of Mr. Lucier’s recent travel to San Diego, but even if
10 Alphatec prevails on showing Mr. Lucier’s travel places him within the geographic
11 limit of the Court’s subpoena power—a close question under the case law—it
12 cannot overcome the fact that traveling to California for the possibility of presenting
13 live testimony would nevertheless impose an undue burden on a third-party.
14 Specifically, of the two discrete rebuttal topics Alphatec has identified, neither
15 presents a situation where Mr. Lucier possesses unique, relevant testimony.
16 Regarding one, assignor estoppel, Alphatec has identified no specific relevant
17 information that Mr. Lucier possesses on the subject (and in any event, NuVasive
18 does not intend to pursue this defense at trial, which the Court dismissed on
19 summary judgment almost two years ago). On the other topic, surgeon relationships,
20 while Mr. Lucier possesses some knowledge, he is not the only—or even the best—
21 NuVasive witness to address this at trial. At trial, NuVasive will call Paul
22 McClintock, NuVasive’s Vice President of Global Clinical Customer Engagement,
23 whom Alphatec deposed at length on the subject in December 2021. As Alphatec is
24 aware, Mr. McClintock possesses information concerning both his own first-hand
25 experience cultivating surgeon relationships at NuVasive, as well as the “lock down
26 surgeons” email chain Alphatec highlights in its brief (which Mr. Lucier sent to Mr.
27 McClintock). In addition, Alphatec has designated portions of Mr. Lucier’s
28

1 deposition testimony directly addressing these topics as well. Because Alphatec
2 cannot demonstrate a unique need for Mr. Lucier’s live testimony on this single
3 remaining topic, the Court should grant Mr. Lucier’s motion to quash Alphatec’s
4 trial subpoena.

5 II. ARGUMENT

6 A. Geographic Limit

7 Federal Rule of Civil Procedure 45(c)(1)(A) provides that a subpoena may
8 command a person to attend a trial only “within 100 miles of where the person
9 resides, is employed, or regularly transacts business in person.” Alphatec argues that
10 it satisfies the geographic limitation in Rule 45 because Mr. Lucier “regularly
11 transacts business in person” in San Diego due to his travel to the area over the last
12 two years. Alphatec’s argument improperly conflates Mr. Lucier’s business and
13 personal travel. When Mr. Lucier’s business travel is separated out from his leisure
14 travel, as the rule and case law require, he is not within the geographic limits.

15 Both parties agree Rule 45 is to be read literally. *See* Doc. No. 383 (Alphatec
16 Resp.) at 9 (quoting *Regents of the Univ. of Cal. v. Kohne*, 166 F.R.D. 463, 464
17 (S.D. Cal. 1996)). And the rule is clear that only travel relevant to this analysis is
18 travel to “transact business in person.” Fed. R. Civ. P. 45(c)(1)(A). As a result,
19 courts have noted that “[r]egularly vacationing is not the same as regularly
20 conducting business in person.” *Expansion Capital Grp., LLC v. Patterson*, No. 19-
21 00214 (MN), 2020 U.S. Dist. LEXIS 701, at *5 (D. Del. Jan. 3, 2020). To hold
22 otherwise would “countervail the entire purpose of Rule 45(c)’s restrictions.” *Id.* at
23 *7 (noting that considering those contacts would yield the absurd result that “any
24 person who owns any property in Delaware or regularly drives through Delaware
25 and stops for gas, a coffee, and an ATM visit at a rest stop could be deposed here”).¹

26
27 ¹ While Alphatec attempts to distinguish *Expansion Capital* factually, the
28 petitioner’s contacts within the geographic range in that case were arguably *more*
substantial than Mr. Lucier’s to San Diego: the petitioner in *Expansion Capital*
(continued...)

1 Rather than separate out Mr. Lucier’s work and personal travel, however,
2 Alphatec lumps it all together, attempting to gild the proverbial lily. *See* Doc. No.
3 383 at 5, 10 (highlighting forty trips in the last two years, estimating Mr. Lucier
4 spent an average of sixty days per year in San Diego each of those years). But
5 Alphatec admits that **only nine** of the forty trips were paid for by Mr. Lucier’s
6 employer, and that Mr. Lucier characterizes his travel to San Diego as “principally
7 for leisure.” Doc. No. 383 at 10-11. Indeed, the two trips Alphatec calls out
8 specifically in its response—Mr. Lucier’s recent vacation with his family over the
9 Christmas holiday and a wedding he attended in San Diego this month—illustrate
10 the personal nature of much of Mr. Lucier’s travel to San Diego.

11 When Mr. Lucier’s *business travel* is compared to the case law, the argument
12 is close. Notably, Alphatec cites only **one case** in which a court found travel rose to
13 the level of “regularly conducting business.” *See Halliburton Energy Servs. v. M-I,*
14 *LLC*, No. H-06-mc-00053, 2006 U.S. Dist. LEXIS 66374, at *4-5 (S.D. Tex. Sep.
15 15, 2006). In *Halliburton*, Southern District of Texas found that the defendant could
16 depose an individual who possessed necessary information—the inventor of a patent
17 in issue in the litigation—who had traveled to Houston an average of 40 days per
18 year **over the course of ten years**. *Id.* But even there, the Court recognized the
19 burden to the inventor, noting with approval that the defendant had agreed to either
20 pay for the inventor’s travel expenses, depose the inventor in Germany, or combine
21 the deposition with inventor’s regularly scheduled business trips to Houston. *Id.* at
22 *5-6.

23 Using Alphatec’s own math, Mr. Lucier’s business travel (nine trips in two
24 years) is lower than the travel in *Halliburton*. And it more closely resembles cases in
25

26 owned a home in Delaware, resided in that home for a substantial amount of time
27 while his residence in Puerto Rico was being repaired after “sustaining hurricane
28 damage,” had registered two vehicles in Delaware, and owned several business
entities in Delaware. 2020 U.S. Dist. LEXIS 701 at *3-4.

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