

Paper No. _____
Filed: February 5, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALPHATEC HOLDINGS, INC. and ALPHATEC SPINE, INC.
Petitioners,

v.

NUVASIVE, INC.,
Patent Owner.

Case IPR2019-00361
Patent No. 8,187,334

PATENT OWNER'S OBJECTIONS TO EVIDENCE

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(b)(1), NuVasive, Inc. (“Patent Owner”) submits the following objections to Alphatec Holdings, Inc. and Alphatec Spine, Inc.’s (“Petitioners”) Exhibits 1053-1056 and 1059-1065, and any reference to or reliance on the foregoing Exhibits in the Petition or future filings by Petitioners. Patent Owner’s objections are made pursuant to the Code of Federal Regulations (“C.F.R.”) governing this proceeding, including without limitation 37 C.F.R. §§ 42.61-42.65 and § 42.6(a)(3). As required by 37 C.F.R. § 42.62, Patent Owner’s objections below apply the Federal Rules of Evidence (“F.R.E.”).

II. OBJECTIONS.

1. Objections to Exhibits 1053 and 1054, and any Reference to/Reliance Thereon

Grounds for Objection: F.R.E. 401 (Test for Relevant Evidence); F.R.E. 402 (General Admissibility of Relevant Evidence); F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons).

Petitioner relies on exhibits 1053 and 1054 as the basis for a theory of unpatentability presented for the first time in reply. Accordingly, these exhibits are not relevant to the proceeding. 2018 Revised Trial Practice Guide at 14 (“Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g. to make out a prima facie case of unpatentability.”); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (quoting 35 U.S.C. § 312(a)(3)) (“[T]he

statute envisions that a petitioner will seek an inter partes review of a particular kind—one guided by a petition describing ‘each claim challenged’ and ‘the grounds on which the challenge to each claim is based.’”). Further, to the extent any of these exhibits is deemed relevant, admission of these exhibits would be unduly prejudicial, misleading, and a waste of time.

2. Objections to Exhibit 1055, and any Reference to/Reliance Thereon

Grounds for Objection: F.R.E. 401 (Test for Relevant Evidence); F.R.E. 402 (General Admissibility of Relevant Evidence); F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons); F.R.E. 802 (The Rule Against Hearsay).

Exhibit 1055 appears to be a reference authored by Dr. Brantigan in 1993 with handwritten notes throughout the document. Additionally, much of the figures in the document are of such low quality as to be illegible. The reply brief fails to explain how this document is relevant to the case Petitioner set forth in its materials. To the extent Petitioner is relying on the handwritten notes, these are hearsay. To the extent that Petitioner relies on the reference itself, much of it is illegible and, as noted above, not relevant to this proceeding. Further, to the extent that the exhibit is deemed relevant, admission of the exhibit would be unduly prejudicial, misleading, and a waste of time.

3. Objections to Exhibits 1056, 1059-1061, and 1065, and any Reference to/Reliance Thereon

Grounds for Objection: F.R.E. 106 (Remainder of or Related Writings or Recorded Statements); F.R.E. 401 (Test for Relevant Evidence); F.R.E. 402 (General Admissibility of Relevant Evidence); F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons).

Exhibits 1056, 1059-1061, and 1065 represent short excerpts of documents filed in the related district court case and in prior patent office proceedings. If these exhibits are considered admissible, as a point of fairness, the complete documents should be considered at the same time.

4. Objections to Exhibits 1060 and 1062, and any Reference to/Reliance Thereon

Grounds for Objection: F.R.E. 401 (Test for Relevant Evidence); F.R.E. 402 (General Admissibility of Relevant Evidence); F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons).

Exhibits 1060 and 1062 are not cited in the Petitioner Reply or elsewhere in this proceeding. Additionally, these exhibits are from proceedings concerning patents that are not at issue here. Accordingly, these exhibits are not relevant to the proceeding. Further, to the extent any of these exhibits is deemed relevant, admission of these exhibits would be unduly prejudicial, misleading, and a waste of time in view of the fact that these are not cited in the Petitioner Reply.

5. Objections to Exhibit 1064, and any Reference to/Reliance Thereon

Grounds for Objection: F.R.E. 106 (Remainder of or Related Writings or Recorded Statements); F.R.E. 401 (Test for Relevant Evidence); F.R.E. 402 (General Admissibility of Relevant Evidence); F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons); F.R.E. 901 (Authenticating or Identifying Evidence).

Exhibit 1064 appears to be a printout from a website that allegedly reports payment data for an unspecified period of time. Petitioner also fails to include related writings which should in fairness be included. No evidence has been submitted to support a finding that the item is what the Petitioner claims it is. Because the document has not been authenticated it is not relevant to this proceeding. Further, to the extent the exhibit is deemed relevant, admission of the exhibit would be unduly prejudicial, misleading, and a waste of time.

6. Objections to Exhibit 1059, 1060, and 1063, and any Reference to/Reliance Thereon

Grounds for Objection: F.R.E. 401 (Test for Relevant Evidence); F.R.E. 402 (General Admissibility of Relevant Evidence); F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons).

Exhibits 1059, 1060, and 1063 contain a cover page that suggests that these exhibits are part of a declaration not in evidence and not relevant to any issue in this case. To the extent any portion of these exhibits is deemed relevant, admission

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