

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALPHATEC HOLDINGS, INC. and ALPHATEC SPINE, INC.,
Petitioner,

v.

NUVASIVE, INC.,
Patent Owner.

Cases¹

IPR2019-00361 (Patent 8,187,334 B2)
IPR2019-00362 (Patent 8,361,156 B2)
IPR2019-00546 (Patent 8,187,334 B2)

Before DENISE M. POTHIER, HYUN J. JUNG, and
SHEILA F. McSHANE, *Administrative Patent Judges*.

JUNG, *Administrative Patent Judge*.

SCHEDULING ORDER

¹ We exercise our discretion to issue one Order to be entered in each proceeding. The parties are not authorized to use a multiple-case caption.

IPR2019-00361 (Patent 8,187,334 B2)
IPR2019-00362 (Patent 8,361,156 B2)
IPR2019-00546 (Patent 8,187,334 B2)

A. GENERAL INSTRUCTIONS

1. Initial Conference Call

The parties are directed to contact the Board within a month of this Order if there is a need to discuss proposed changes to this Scheduling Order or proposed motions that have not been authorized in this Order or other prior Order or Notice. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,765–66 (Aug. 14, 2012) (“Practice Guide”) (guidance in preparing for the initial conference call). A request for an initial conference call shall include a list of proposed motions, if any, to be discussed during the call.

2. Protective Order

No protective order shall apply to this proceeding until the Board enters one. If either party files a motion to seal before entry of a protective order, a jointly proposed protective order shall be filed as an exhibit with the motion. The Board encourages the parties to adopt the Board’s default protective order if they conclude that a protective order is necessary. *See* Practice Guide, App’x B (Default Protective Order). If the parties choose to propose a protective order deviating from the default protective order, they must submit the proposed protective order jointly along with a marked-up comparison of the proposed and default protective orders showing the differences between the two and explain why good cause exists to deviate from the default protective order.

The Board has a strong interest in the public availability of trial proceedings. Redactions to documents filed in this proceeding should be limited to the minimum amount necessary to protect confidential

IPR2019-00361 (Patent 8,187,334 B2)
IPR2019-00362 (Patent 8,361,156 B2)
IPR2019-00546 (Patent 8,187,334 B2)

information, and the thrust of the underlying argument or evidence must be clearly discernible from the redacted versions. We also advise the parties that information subject to a protective order may become public if identified in a final written decision in this proceeding, and that a motion to expunge the information will not necessarily prevail over the public interest in maintaining a complete and understandable file history. *See Practice Guide 48,761.*

3. Discovery Disputes

The Board encourages parties to resolve disputes relating to discovery on their own. To the extent that a dispute arises between the parties relating to discovery, the parties must meet and confer to resolve such a dispute before contacting the Board. If attempts to resolve the dispute fail, a party may request a conference call with the Board.

In any request for a conference call with the Board to resolve a discovery dispute, the requesting party shall: (a) certify that it has conferred with the other party in a good faith effort to resolve the dispute; (b) identify with specificity the issues for which agreement has not been reached; (c) identify the precise relief to be sought; and (d) propose specific dates and times at which both parties are available for the conference call.

4. Testimony

The parties are reminded that the Testimony Guidelines appended to the Trial Practice Guide, Appendix D, apply to this proceeding. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. 37 C.F.R. § 42.12. For example, reasonable expenses and

IPR2019-00361 (Patent 8,187,334 B2)
IPR2019-00362 (Patent 8,361,156 B2)
IPR2019-00546 (Patent 8,187,334 B2)

attorneys' fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

5. Cross-Examination

Cross-examination ordinarily takes place after any supplemental evidence is due. 37 C.F.R. § 42.53(d)(2).

Cross-examination ordinarily ends no later than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. *Id.*

6. Motion to Amend

Patent Owner may file a motion to amend without prior authorization from the Board. Nevertheless, Patent Owner must confer with the Board before filing such a motion. 37 C.F.R. § 42.121(a). To satisfy this requirement, Patent Owner should request a conference call with the Board no later than two weeks prior to DUE DATE 1. *See* Section B below regarding DUE DATES.

Patent Owner has the option to receive preliminary guidance from the Board on its motion to amend. *See Notice Regarding a New Pilot Program Concerning Motion to Amend Practice and Procedures in Trial Proceedings under the America Invents Act before the Patent Trial and Appeal Board*, 84 Fed. Reg. 9497 (Mar. 15, 2019) (“MTA Pilot Program Notice”). If Patent Owner elects to request preliminary guidance from the Board on its motion, it must do so in its motion to amend filed on DUE DATE 1.

Any motion to amend and briefing related to such a motion shall generally follow the practices and procedures described in MTA Pilot Program Notice unless otherwise ordered by the Board in this proceeding.

IPR2019-00361 (Patent 8,187,334 B2)
IPR2019-00362 (Patent 8,361,156 B2)
IPR2019-00546 (Patent 8,187,334 B2)

The parties are further directed to the Board's Guidance on Motions to Amend in view of *Aqua Products* (<https://go.usa.gov/xU6YV>), and *Lectrosonics, Inc. v. Zaxcom, Inc.*, Case IPR2018-01129 (Paper 15) (PTAB Feb. 25, 2019) (precedential).

As indicated in the MTA Pilot Program Notice, Patent Owner has the option at DUE DATE 3 to file a revised motion to amend (instead of a reply, as noted above) after receiving petitioner's opposition to the original motion to amend and/or after receiving the Board's preliminary guidance (if requested). A revised motion to amend must provide amendments, arguments, and/or evidence in a manner that is responsive to issues raised in the preliminary guidance and/or petitioner's opposition.

If Patent Owner files a revised motion to amend, the Board shall enter a revised scheduling order setting the briefing schedule for that revised motion and adjusting other due dates as needed. *See* MTA Pilot Program Notice, App'x B 1B.

As also discussed in the MTA Pilot Program Notice, if the Board issues preliminary board guidance on the motion to amend and the Patent Owner does not file either a reply to the opposition to the motion to amend or a revised motion to amend at DUE DATE 3, Petitioner may file a reply to the Board's preliminary guidance, no later than three (3) weeks after DUE DATE 3. The reply may only respond to the preliminary guidance. Patent Owner may file a sur-reply in response to Petitioner's reply to the Board's preliminary guidance. The sur-reply may only respond to arguments made in the reply and must be filed no later than three (3) weeks after the

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.