

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 No. IPR2019-00362
United States Patent No. 8,361,156

**PETITIONERS' OBJECTIONS PURSUANT TO 37 C.F.R. § 42.64(B)(1)
TO PATENT OWNER'S EVIDENCE SUBMITTED WITH PATENT
OWNER PRELIMINARY RESPONSE**

Pursuant to 37 C.F.R. § 42.64(b)(1) and the Federal Rules of Evidence (“FRE”), Petitioners submit the following objections to evidence served with Patent Owner Preliminary Response Pursuant to 37 C.F.R. § 42.107 (Paper No. 11). Petitioners’ objections are timely filed within 10 business days of the July 9, 2019 Institution Decision (Paper No. 18).

Petitioners reserve the right to present further objections to this or any additional evidence submitted by Patent Owner, consistent with the applicable rules and other authority.

Exs. 2002 and 2011 – Petitioners object to Exhibits 2002 and 2011 under FRE 401, 402, and 37 C.F.R. § 42.61 because the Exhibits do not have a tendency to make a consequential fact in this action more or less probable than it would without the evidence. For example, and without limitation, Exhibits 2002 and 2011 were filed in a proceeding involving a patent other than the ’156 patent at issue in this IPR. Further, Exhibit 2002 refers to the ’156 patent for the proposition that implants disclosed in the ’156 patent do “not require the removal of portions of the adjacent vertebrae,” which are not limitations recited by the challenged claims, and as such, are not relevant to whether there is any nexus between the challenged claims and any objective indicia of nonobviousness, including commercial success, industry praise, copying, skepticism, failure of others, and unexpected results. The same objections apply to Exhibit 2011, which Exhibit

2002 cites in support of purported secondary considerations. Petitioners further object to Exhibits 2002 and 2011 under FRE 403 because any probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, wasting time, or needlessly presenting cumulative evidence. For example, and without limitation, the probative value of an unauthenticated and not self-authenticating (FRE 901 and FRE 902) declaration (Ex. 2002) and underlying exhibit (Ex. 2011) relating to a different patent in a different proceeding is substantially outweighed by the confusion created regarding whether there is any nexus between any limitations of the challenged claims and any objective indicia of nonobviousness (FRE 403). Further, Petitioners object to Exhibits 2002 and 2011 under FRE 801 and 802 to the extent Patent Owner relies upon these Exhibits to prove any objective indicia of nonobviousness.

Exs. 2003 and 2018 – Petitioners object to these unauthenticated and not self-authenticating (FRE 901 and FRE 902) documents under FRE 401, 402, and 37 C.F.R. § 42.61 because Exhibits 2003 and 2018 do not have a tendency to make a consequential fact in this action more or less probable than it would without the evidence. For example, and without limitation, the work history of certain Alphatec employees is not relevant to the invalidity of the challenged claims. Further, the probative value of the work history of certain Alphatec employees is substantially outweighed by the confusion created regarding invalidity of the

challenged claims (FRE 403). Additionally, even if the Exhibits were relevant (and they are not), Petitioners object because Exhibits 2003 and 2018 are hearsay pursuant to FRE 801 and FRE 802.

Exs. 2013 through 2015 – Petitioners object to these unauthenticated and not self-authenticating (FRE 901 and FRE 902) Exhibits 2013, 2014, and 2015 under FRE 401, 402, and 37 C.F.R. § 42.61 because these Exhibits do not have a tendency to make a consequential fact in this action more or less probable than it would without the evidence. For example, and without limitation, Patent Owner identifies Exhibit 2013 as part of a string cite and does not identify any paragraphs from Exhibit 2013 to support any proposition in the Patent Owner Preliminary Response. *See, e.g.*, Patent Owner Preliminary Response at 62. Additionally, the whole of Exhibit 2013 relates to the declarant's "opinions regarding infringement." *See, e.g.*, Ex. 2013 at ¶ 1. Similarly, Patent Owner cites "Ex. 2014 at 7" (Patent Owner Preliminary Response at 62), but that page of Exhibit 2014 expresses the declarant's opinion regarding infringement of the '156 patent.

Further, and without limitation, Patent Owner cites "Ex. 2015, ¶¶ 314-366," (Patent Owner Preliminary Response at 62). Those paragraphs express the declarant's opinion regarding validity of certain claims of U.S. Patent Nos. 7,819,801; 8,355,780; 8,439,832; 9,833,227; and 8,753,270.

Petitioners' Objections to Evidence

Petitioners also object to these Exhibits under FRE 801 and 802 to the extent Patent Owner relies upon these Exhibits to prove any objective indicia of nonobviousness or what certain prior art references may disclose because the declarant has not submitted any declarations in this proceeding and is not subject to cross examination.

Date: July 23, 2019

Respectfully submitted,

/Jovial Wong/

Jovial Wong

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