

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.

IPR2019-00361 (Patent 8,187,334 B2)
IPR2019-00362 (Patent 8,361,156 B2)
IPR2019-00546 (Patent 8,187,334 B2)¹

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

JUNG, *Administrative Patent Judge*.

ORDER
Oral Hearing
37 C.F.R. § 42.70

¹ We exercise our discretion to issue one Order to be entered in each proceeding.

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We had previously revised the Scheduling Order for the above-listed proceedings because the parties were amenable to having the oral hearing conducted as part of the PTAB/TTAB Stadium Tour program to be held at the University of Oregon School of Law. *See* Paper 34, 2.² We also determined that Petitioner's and Patent Owner's requirement to request oral argument by Due Date 4, as per the original Scheduling Order, has been satisfied. *Id.* Unfortunately, we have been informed that the University of Oregon School of Law is in the process of canceling or postponing events scheduled for March and April, including the PTAB/TTAB Stadium Tour, due to health concerns.

In view of this, we are modifying the hearing location, and the hearing will be conducted at the **USPTO Central Headquarters in Alexandria, Virginia** (the ninth floor of Madison Building East, 600 Dulany Street, Alexandria, Virginia, 22314), and will commence at **9:00 AM Eastern Time, on Friday, April 3, 2020**. We will promptly advise the parties if any future changes to the oral hearing become necessary. The hearing will be open to the public for in-person attendance that will be accommodated on a first-come, first-served basis.

Each party will have sixty (60) minutes of total oral argument time. Petitioner will argue first and may present arguments regarding the challenged claims. Patent Owner will then have the opportunity to respond to Petitioner's arguments. Next, Petitioner may use any time it has reserved for rebuttal to respond to Patent Owner's arguments. Lastly, Patent Owner

² For purposes of expediency, all citations are to IPR2019-00361 unless otherwise noted.

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may use any time it has reserved for sur-rebuttal to respond to Petitioner's rebuttal arguments. No other arguments will be heard.

The Board will provide a court reporter, and the reporter's transcript will constitute the official record of the hearing. The hearing transcript will be entered in the record of this proceeding.

Under 37 C.F.R. § 42.70(b), demonstrative exhibits, if any, must be served at least (7) seven business days before the hearing. Demonstrative exhibits are visual aids to oral argument and not evidence, and should be clearly marked as such. For example, each slide may be marked with the words "DEMONSTRATIVE EXHIBIT – NOT EVIDENCE" in the footer. Demonstrative exhibits may not be used to advance arguments or introduce evidence not previously presented in the record. *See Dell Inc. v. Acceleron, LLC*, 884 F.3d 1364, 1369 (Fed. Cir. 2018) (noting that the "Board was obligated to dismiss [the petitioner's] untimely argument . . . raised for the first time during oral argument"). Instead, demonstrative exhibits should cite to the briefs and evidence in the record. Demonstrative exhibits, marked as noted above, should be filed in accordance with 37 C.F.R. § 42.70(b) at least two (2) business days before the hearing.

The Board expects that the parties will meet and confer in good faith to resolve any objections to demonstrative exhibits, but if any objections cannot be resolved, the unresolved objections must be filed with the Board at least (2) two business days before the hearing. Any objection to demonstrative exhibits that is not timely presented will be considered waived. The objections should identify with particularity which demonstratives and portions thereof are subject to objection, and include a

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short (one sentence or less) statement of the reason for each objection. No argument or further explanation is permitted. The Board will consider the objections and schedule a conference if the Board deems necessary. Otherwise, the Board will rule on the objections at the hearing.

To aid in the preparation of an accurate transcript, each party shall provide a paper copy of any demonstratives to the court reporter on the day of the oral argument. Such paper copies shall not become part of the record of this proceeding. The parties are reminded that, during the hearing, the presenter should identify clearly each demonstrative exhibit (e.g., by slide or screen number) to ensure the clarity and accuracy of the reporter's transcript and permit any judge participating from a remote location to follow the arguments.

The Board expects lead counsel for each party to be present in person at the oral hearing. However, any counsel of record may present the party's argument as long as that counsel is present in person. If either party expects that its lead counsel will not be attending the oral argument, the parties should initiate a joint telephone conference with the Board no later than two (2) business days prior to the oral hearing to discuss the matter.

A party may request remote video attendance for one or more of its other attendees to view the hearing from any USPTO location. The available locations include the Texas Regional Office in Dallas, Texas; the Rocky Mountain Regional Office in Denver, Colorado; the Elijah J. McCoy Midwest Regional Office in Detroit, Michigan; and the Silicon Valley Office in San Jose, California. To request remote video viewing, a party must send an email message to Trials@uspto.gov at least ten business days prior to the

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hearing, indicating the requested location and the number planning to view the hearing from the remote location. The Board will notify the parties if the request for video viewing is granted. Note that it may not be possible to grant the request due to the availability of resources.

Any special requests for audio-visual equipment should be directed to Trials@uspto.gov. A party may also indicate any special requests related to appearing at an in-person oral hearing, such as a request to accommodate physical needs that limit mobility or visual or hearing impairments, and indicate how the PTAB may accommodate the special request. Any special requests must be presented in a separate communication not less than five (5) days before the hearing. If the request is not received timely, the equipment may not be available on the day of the hearing.

Any requests for a pre-hearing conference must be made by March 27, 2020. To request such a conference, an email should be sent to Trials@uspto.gov including several dates and times of availability for all parties that are generally no later than three business days prior to the oral hearing and shall include list of issues to be discussed during the conference.

It is

ORDERED that an oral hearing, conducted in accordance with the procedures set forth above, shall commence at 9:00 AM ET on April 3, 2020 in Alexandria, Virginia.

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