

**EXHIBIT F**  
**TO DASHE DECLARATION**

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 ALPHATEC HOLDINGS, INC. and  
 9 ALPHATEC SPINE, INC.

10 **UNITED STATES DISTRICT COURT**  
 11 **SOUTHERN DISTRICT OF CALIFORNIA**  
 12 **SAN DIEGO DIVISION**

14 NUVASIVE, INC., a Delaware  
 corporation,

15 Plaintiff,

16 v.

17 ALPHATEC HOLDINGS, INC., a  
 18 Delaware corporation and ALPHATEC  
 SPINE, INC., a California corporation,

19 Defendants.  
 20

**Case No. 3:18-CV-00347-CAB-MDD**

*[Assigned to Courtroom 4C – Honorable  
 Cathy Ann Bencivengo]*

**DEFENDANTS’ AMENDED  
 INVALIDITY CONTENTIONS**

Complaint Filed: February 13, 2018  
 Jury Trial Demanded

**DEFENDANTS’ AMENDED INVALIDITY CONTENTIONS**

In accordance with the applicable rules of this Court, Defendants Alphatec Holdings, Inc. and Alphatec Spine, Inc. (collectively, “Alphatec”) hereby provide the following Amended Invalidity Contentions regarding:

- Claims 1, 2, 6, 15-17, 19-21, 23, 26, 28, and 29 of U.S. Patent No. 7,819,801 (the “801 patent”);
- Claims 21, 22, and 24-28 of U.S. Patent No. 8,355,780 (the “780 patent”);
- Claims 1-4, 6-10, 12-14, 16, 17, and 19 of U.S. Patent No. 8,439,832 (the “832 patent”);
- Claims 1, 2, 4, 6, 13, 15-17, 19, 22, and 28 of U.S. Patent No. 9,833,227 (the “227 patent”);
- Claims 1, 2, 3, 4, 6, and 12 of U.S. Patent No. 8,753,270 (the “270 patent”); and
- Claims 1, 2, 5, 9, 10, 12-20, 24, and 27 of U.S. Patent No. 8,361,156 (the “156 patent”) (collectively, the “asserted claims”).

The above-listed claims are the only patents and claims identified and asserted by Plaintiff NuVasive, Inc. in its Amended Disclosure of Asserted Claims and Infringement Contentions served on November 9, 2018 (“Infringement Contentions”). Accordingly, Defendants’ Amended Invalidity Contentions specifically address the above-listed patents and claims. Defendants contend that each of the asserted claims is invalid as demonstrated herein. Defendants expressly reserve the right to disclose invalidity contentions with respect to other claims of these patents and/or other patents, to respond to or rebut NuVasive’s arguments for claims asserted or arguments made following its Infringement Contentions.

**I. GENERAL STATEMENT AND RESERVATION OF RIGHTS**

These Invalidity Contentions are preliminary, and based upon information available to Defendants at an early state of litigation, prior to claim construction, completion of fact discovery, or expert discovery. Defendants reserve the right to amend or supplement these contentions or any charts appended hereto, including

1 pursuant to the Court's Case Management Orders (Doc. Nos. 101 and 109). Further,  
2 additional prior art not included in these Amended Invalidity Contentions and/or facts,  
3 documents, and things whether known or unknown to Defendants may become relevant  
4 to Defendants' defenses. Accordingly, Defendants reserve their right to revise,  
5 supplement, or amend these Amended Invalidity Contentions as additional grounds or  
6 evidence of invalidity are identified in this case, in response to any of Plaintiff's  
7 arguments, following the Court's issuance of a *Markman* ruling, and/or to address any  
8 additional patents or claims that are asserted hereafter. Defendants also reserve their  
9 right to identify references that would disclose, practice, or render obvious any  
10 limitation(s) Plaintiff alleges are missing from the prior art in these Amended Invalidity  
11 Contentions.

12 Defendants' disclosures with respect to each prior art reference identified herein  
13 should not be considered exhaustive. This approach does not preclude Defendants from  
14 relying on any non-cited portion of the identified prior art references. Because the prior  
15 art to Plaintiff's patents is so prolific as to its disclosure of minimally invasive tools and  
16 implants to perform lateral spinal fusion surgery, failure to describe any prior art  
17 reference as disclosing any particular limitation is not an admission that such reference  
18 does not disclose such limitation. Additionally, disclosure of a particular prior art  
19 reference that refers, relies upon, or discusses other material is also a disclosure of the  
20 other material.

21 Defendants take no position here regarding the appropriate construction of any  
22 claim term, if any. Statements purporting to describe claim limitations or apply prior  
23 art to claim limitations are not to be taken as admissions that such terms are definite or  
24 comply with 35 U.S.C. §§ 101 and 112. Defendants maintain that Plaintiff's  
25 Infringement Contentions are insufficient to show infringement of any asserted claim  
26 under any claim construction. These Amended Invalidity Contentions shall not be  
27 treated as an admission that any of Defendants' accused products infringe the asserted  
28 claims or as an admission to the scope of any of the asserted claims.

1 Defendants object to the disclosure of information and/or documents that are  
2 protected by the attorney-client privilege, attorney work-product doctrine, or any other  
3 applicable privilege or immunity. Defendants reserve the right to object to the  
4 admissibility of these Amended Invalidity Contentions or the information contained  
5 herein.

## 6 **II. IDENTIFICATION OF PRIOR ART**

### 7 **A. Priority Date**

#### 8 **1. Priority Date of the '801 Patent**

9 In its Infringement Contentions, Plaintiff contends that the '801 patent is entitled  
10 to a priority date at least as early as February 27, 2003, which is the filing date of U.S.  
11 Provisional Application No. 60/450,806. Plaintiff bears the burden of proving, on a  
12 claim-by-claim basis, that the provisional application provides written description  
13 support for each and every limitation of the asserted claims. Plaintiff has not met this  
14 burden. Plaintiff has similarly failed to meet its burden of showing it is entitled to any  
15 other priority date earlier than the date of filing. Further, Plaintiff is not entitled to a  
16 priority date of February 27, 2003, at least because the Provisional Application fails to  
17 disclose or provide support for the following, as claimed by the '801 patent: retractor  
18 blades with “generally concave inner-facing surface[s];” “pivoting” or “pivotable” arm  
19 members” with “pivot[ing]” movements. Defendants reserve their right to rebut or  
20 further challenge any priority date argument advanced by Plaintiff, or rely on additional  
21 prior art references.

#### 22 **2. Priority Date of the '780 Patent**

23 In its Infringement Contentions, Plaintiff contends that the '780 patent is entitled  
24 to a priority date at least as early as September 25, 2003, which is the filing date of U.S.  
25 Provisional Application No. 60/506,136. Plaintiff bears the burden of proving, on a  
26 claim-by-claim basis, that the provisional application provides written description  
27 support for each and every limitation of the asserted claims. Plaintiff has not met this  
28 burden. Plaintiff has similarly failed to meet its burden of showing it is entitled to any

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