

EXHIBIT 9

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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’ PRELIMINARY
INVALIDITY CONTENTIONS FOR
U.S. PATENT NOS. 9,924,859;
9,974,531; AND 8,187,334**

Complaint Filed: February 13, 2018
Amended Complaint Filed: September 13,
2018

Jury Trial Demanded

1 **DEFENDANTS’ PRELIMINARY INVALIDITY CONTENTIONS FOR U.S.**
2 **PATENT NOS. 9,924,859; 9,974,531; AND 8,187,334**

3 In accordance with the applicable rules of this Court, Defendants Alphatec
4 Holdings, Inc. and Alphatec Spine, Inc. (collectively, “Alphatec”) hereby provide the
5 following Preliminary Invalidity Contentions for the following patents asserted by
6 Plaintiff NuVasive, Inc. in its Disclosure of Asserted Claims and Infringement
7 Contentions served on June 29, 2018 and its Amended Complaint (Doc. No. 110):

- 8 • Claims 1-26 and 28-36 of U.S. Patent No. 9,924,859 (the “859 patent”);
 - 9 • Claims 1-39 of U.S. Patent No. 9,974,531 (the “531 patent”); and
 - 10 • Claims 6-9, 16, and 18 of U.S. Patent No. 8,187,334 (the “334 patent”)
- 11 (collectively, the “asserted claims” of the “Newly Asserted Patents”).

12 Defendants’ Preliminary Invalidity Contentions for Newly Asserted Patents specifically
13 address the above-listed patents and claims. Defendants contend that each of the
14 asserted claims is invalid as demonstrated herein. Defendants expressly reserve the
15 right to disclose invalidity contentions with respect to other claims of these patents
16 and/or other patents, to respond to or rebut NuVasive’s arguments for claims asserted
17 or arguments made following its June 29, 2018 Infringement Contentions.

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

19 The invalidity contentions disclosed herein are preliminary, and based upon
20 information available to Defendants at an early state of litigation, prior to claim
21 construction, completion of fact discovery, or expert discovery, and in light of the
22 volume of asserted claims, including asserted claims with very long chains of
23 dependency. Defendants reserve the right to amend or supplement these Preliminary
24 Invalidity Contentions or any charts appended hereto, including pursuant to the Court’s
25 Case Management Order (Doc. No. 101). Further, additional prior art not included in
26 these Preliminary Invalidity Contentions and/or facts, documents, and things whether
27 known or unknown to Defendants may become relevant to Defendants’ defenses.
28 Accordingly, Defendants reserve their right to revise, supplement, or amend these

1 of Defendants' accused products infringe the asserted claims or as an admission to the
2 scope of any of the asserted claims.

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

8 **II. IDENTIFICATION OF PRIOR ART**

9 **A. Priority Date**

10 **1. Priority Date of the '859 Patent**

11 In its Infringement Contentions, Plaintiff contends that the '859 patent is entitled
12 to a priority date at least as early as August 23, 2010, which is the filing date of U.S.
13 Provisional Application No. 61/376,163. Plaintiff bears the burden of proving, on a
14 claim-by-claim basis, that the provisional application provides written description
15 support for each and every limitation of the asserted claims. Plaintiff has not met this
16 burden. Defendants reserve their right to challenge the priority date claimed by the
17 Plaintiff for the '859 patent.

18 **2. Priority Date of the '531 Patent**

19 In its Infringement Contentions, Plaintiff contends that the '531 patent is entitled
20 to a priority date at least as early as September 25, 2003, which is the filing date of U.S.
21 Provisional Application No. 60/506,136. Plaintiff bears the burden of proving, on a
22 claim-by-claim basis, that the provisional application provides written description
23 support for each and every limitation of the asserted claims. Plaintiff has not met this
24 burden. Defendants reserve their right to challenge the priority date claimed by the
25 Plaintiff for the '531 patent.

26 **3. Priority Date of the '334 Patent**

27 In its Infringement Contentions, Plaintiff contends that the '334 patent is entitled
28 to a priority date at least as early as March 29, 2004, which is the filing date of U.S.

1 Provisional Application No. 60/557,536. Plaintiff bears the burden of proving, on a
2 claim-by-claim basis, that the provisional application provides written description
3 support for each and every limitation of the asserted claims. Plaintiff has not met this
4 burden. Defendants reserve their right to challenge the priority date claimed by the
5 Plaintiff for the '334 patent.

6 **B. Identification of Prior Art**

7 The asserted claims are anticipated or rendered obvious by the prior art identified
8 herein. Specifically, Defendants may rely on any or all of the prior art references
9 disclosed in the below non-exhaustive list, either alone or in combination, under 35
10 U.S.C. §§ 102(a), (b), (e), (f), or (g) and/or 35 U.S.C. § 103, or to show the state of the
11 art at the relevant time:

- 12 • *The lateral percutaneous approach to discectomy*, W.A. Friedman *et al.*
13 (“Friedman”), published 1988; and further described in: *Percutaneous*
14 *Discectomy: An Alternative to Chemonucleolysis?*, W. A. Friedman, published
15 1983; *Percutaneous discectomy: An Anatomical Study*, S.L. Kanter, et al.,
16 published 1985; and U.S. Patent No. 4,545,374 (“Jacobson”), issued October 8,
17 1985
- 18 • U.S. Patent No. 6,945,933 (“Branch”), issued September 20, 2005
- 19 • German Patent Application No. 100 48 790.4 (“Cistac”), published April 25,
20 2002
- 21 • U.S. Patent No. 7,261,688 (“Smith”), issued August 28, 2007
- 22 • U.S. Patent No. 5,681,265 (“Maeda”), issued October 28, 1997
- 23 • U.S. Patent No. 5,928,139 (“Koros”), issued July 27, 1999
- 24 • U.S. Patent No. 5,772,661 (“Michelson '661”), issued June 30, 1998
- 25 • U.S. Patent No. 6,368,351 (“Glenn”), issued April 9, 2002
- 26 • U.S. Patent No. 5,171,279 (“Mathews '279”), issued December 15, 1992
- 27 • U.S. Patent No. 6,206,826 (“Mathews '826”), issued March 27, 2001
- 28 • U.S. Patent Application Publication No. 2002/0022847 (“Ray”), published
February 21, 2002
- U.S. Patent No. 6,500,180 (“Foley”), issued December 31, 2002
- European Spine Journal, *The use of a retractor system (SynFrame) for open,*
minimal invasive reconstruction of the anterior column of the thoracic and

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