

# EXHIBIT 11

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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  
 21

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

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

**DEFENDANTS’ SUPPLEMENTAL  
 AMENDED INVALIDITY  
 CONTENTIONS**

Complaint Filed: February 13, 2018  
 Jury Trial Demanded

**DEFENDANTS’ SUPPLEMENTAL 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

1 reserve their right to rebut or further challenge any priority date argument advanced by  
2 Plaintiff, or rely on additional prior art references.

3 **6. Priority Date of the '156 Patent**

4 In its Infringement Contentions, Plaintiff contends that the '156 patent is entitled  
5 to a priority date at least as early as March 29, 2004, which is the filing date of U.S.  
6 Provisional Application No. 60/557,536. Plaintiff bears the burden of proving, on a  
7 claim-by-claim basis, that the provisional application provides written description  
8 support for each and every limitation of the asserted claims. Plaintiff has not met this  
9 burden. Defendants reserve their right to challenge the priority date claimed by the  
10 Plaintiff for the '156 patent.

11 **B. Identification of Prior Art**

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

- 17 • *The lateral percutaneous approach to discectomy*, W.A. Friedman *et al.*  
18 (“Friedman”), published 1988; and further described in: *Percutaneous*  
19 *Discectomy: An Alternative to Chemonucleolysis?*, W. A. Friedman, published  
20 1983; *Percutaneous discectomy: An Anatomical Study*, S.L. Kanter, et al.,  
21 published 1985; and U.S. Patent No. 4,545,374 (“Jacobson”), issued October 8,  
22 1985
- 23 • U.S. Patent No. 6,945,933 (“Branch”), issued September 20, 2005
- 24 • German Patent Application No. 100 48 790.4 (“Cistac”), published April 25,  
25 2002
- 26 • U.S. Patent No. 7,261,688 (“Smith”), issued August 28, 2007
- 27 • U.S. Patent No. 5,681,265 (“Maeda”), issued October 28, 1997
- 28 • U.S. Patent No. 5,928,139 (“Koros”), issued July 27, 1999
- U.S. Patent No. 5,931,777 (“Sava”), issued August 3, 1999
- U.S. Patent No. 6,196,969 (“Bester”), issued March 6, 2001
- EP 0951868 (“Büttner-Janzen”), issued October 27, 1999

1 because NuVasive itself relied on the Jacobson technique to invalidate other patents that  
2 claimed a lateral, transpoas path. *Cardpool, Inc. v. Plastic Jungle, Inc.*, 817 F.3d 1316,  
3 1323 (Fed. Cir. 2016) (discussing that “[t]he doctrine of judicial estoppel is that where  
4 a party successfully urges a particular position in a legal proceeding, it is estopped from  
5 taking a contrary position in a subsequent proceeding where its interests have changed”  
6 (citation omitted)); *see also, Trustees in Bankr. of N. Am. Rubber Thread Co. v. United*  
7 *States*, 593 F.3d 1346, 1354 (Fed. Cir. 2010) (“Judicial estoppel applies just as much  
8 when one of the tribunals is an administrative agency as it does when both tribunals are  
9 courts.”).

10 One or more of the asserted claims of the ’270 patent are anticipated, at least as  
11 set forth in the claim charts attached herewith as Appendix E. The alleged invention,  
12 including the use of a shim element that penetrates the disc space to anchor a releasably  
13 attached surgical access system that engages with the access system through the use of  
14 a ridge structure, was disclosed by each of at least Branch ’311 and Ray. In particular,  
15 for example and without limitation, Branch ’311 teaches a retractor to which a blade is  
16 attached, the blade having a wedge-shaped distractor tip that extends into the  
17 intervertebral space to provide anchorage. The proximal engagement portion of the  
18 blade in Branch ’311 contains a ridge structure having a slot that engages with a groove  
19 in the retractor. Similarly, for example and without limitation, Ray teaches a removable  
20 guide sleeve tip, with a distal portion containing flanges that extend into the disc space  
21 to mount a guide sleeve. The proximal engagement portion contains a slot for engaging  
22 with a ridge structure.

### 23 **C. On-Sale Bar and Prior Public Use**

24 The asserted claims are subject to the on-sale bar under 35 U.S.C. § 102(b) and/or  
25 35 U.S.C. § 102(a)(1) (AIA). For at least the reasons explained above, Plaintiff has not  
26 met its burden to show that it is entitled to any priority date earlier than the filing date  
27 of each of the asserted patents. Each of the devices discussed below were sold by  
28 Plaintiff NuVasive, Inc. and are subject to the on-sale bar for the reasons described

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