

# EXHIBIT 17



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September 28, 2020

**VIA EMAIL**

Paul Tripodi  
Wilson Sonsini Goodrich & Rosati P.C.  
633 West Fifth Street, Suite 1550  
Los Angeles, CA 90071

**Re: *NuVasive, Inc. v. Alphatec Holdings, Inc., et al.* – S. D. Cal No. 3:18-cv-00347-CAB-MDD**

Dear Counsel,

I write regarding deficiencies in NuVasive’s supplemental responses to Alphatec’s written discovery requests pursuant to the Court’s scheduling order. Doc. No. 293.

First, NuVasive failed to supplement its response to Alphatec’s Interrogatory No. 3 (“ROG No. 3”), which asks NuVasive to provide facts and circumstances relating to the first “offer for sale, sale, public disclosure” for each asserted claim of the patents-in-suit. In its supplemental response, NuVasive “affirm[ed] its prior response and confirm[ed] it has no new information to supplement.” But as discussed below, publicly-available documents demonstrate that offers for sale, sales, and public disclosures of embodying implants occurred before the date provided in NuVasive’s earlier response, which was verified by John English on November 11, 2019. These documents show that NuVasive’s answer is incorrect and that NuVasive is withholding responsive information. Please supplement Interrogatory No. 3 by October 5, 2020.

Second, NuVasive failed to adequately respond to Alphatec’s Request for Production No. 77 (“RFP No. 77”). NuVasive’s response failed to provide the requested information—*e.g.*, documents to show the sale, offer for sale, use, offer for use, or public disclosure of embodying products including NuVasive’s CoRoent implants and/or NuVasive’s Cement Restrictor implants before March 29, 2005.

NuVasive’s excuse that RFP No. 77 is duplicative of RFP Nos. 41, 42, 43, and 53 and Interrogatories Nos. 3 and 13 only shows that NuVasive has failed to respond to several written discovery requests. NuVasive’s response to RFP No. 77 simply identifies Design History Files previously produced and identified in, among other responses, its response to ROG No. 3. These Design History Files are not responsive to Alphatec’s requests for “marketing materials or purchase orders,” and more generally, do

not show “sale[s], offer[s] for sale, use[s], or offer[s] for use,” relating to NuVasive’s CoRoent implants and/or Cement Restrictor implants before March 29, 2005, and are thus insufficient. Alphatec needs documents that show every “sale, offer for sale, use, or offer for use” relating to NuVasive’s CoRoent implants and/or Cement Restrictor implants before March 29, 2005.

Indeed, there are several publicly-available documents that show NuVasive sold, offered for sale, used, or offered for use products embodying the asserted implant patents before March 29, 2005.

For example, in a March 2004 Securities and Exchange Commission (SEC) filing, NuVasive referenced a supply agreement with Invibio, pursuant to which Invibio manufactures and supplies NuVasive’s PEEK cement restrictor product. Exhibit A (NuVasive, Inc., Registration Statement Under the Securities Act of 1933 (Form S-1) 9 (Mar. 5, 2004)).

In an amendment to that filing, NuVasive noted that “[c]ertain of our products may be used by physicians for indications other than those cleared or approved by the FDA.” Exhibit B (NuVasive, Inc., Amendment No. 2 to Registration Statement Under the Securities Act of 1933 (Form S-1) 11 (Apr. 26, 2004)). NuVasive elaborated: “*[s]pecifically, we have been informed that our PEEK product is being used by some surgeons as a synthetic allograft, although it is cleared only for use as a cement restrictor.*” Exhibit B (emphasis added). These filings expressly contradict NuVasive’s supplemental response to ROG No. 3, and NuVasive’s response to RFP No. 77 includes no documents corresponding to these statements.

Documents produced by NuVasive also confirm that embodying products were sold, offered for sale, used, offered for use, or publicly disclosed before October 2004. For example, NuVasive produced an internal email sent in March 2004 in which Matt Copp, Group Director of Marketing, stating that NuVasive’s PEEK cement restrictor implants were commercially available. NUVA\_ATEC0332451.

Alphatec requests that NuVasive supplement its response to ROG No. 3 and produce documents responsive to RFP No. 77 immediately. Further, Alphatec requests NuVasive to confirm that it has identified all products that embody the implant patents in its response to Alphatec’s Interrogatory No. 13, or otherwise supplement its response to do so. If NuVasive fails to do so by October 5, 2020, Alphatec intends to seek relief with the Court.

Alphatec reserves the right to raise additional issues regarding NuVasive’s discovery responses.

Sincerely,

/s/Brian Nisbet  
Brian Nisbet

# Exhibit A

9/22/2020

https://www.sec.gov/Archives/edgar/data/1142596/000104746904006806/a2129963zs-1.htm

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As filed with the Securities and Exchange Commission on March 5, 2004

Registration No. 333-

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**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

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**FORM S-1  
REGISTRATION STATEMENT  
UNDER THE SECURITIES ACT OF 1933**

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**NuVasive, Inc.**

(Exact name of Registrant as specified in its charter)

**Delaware**  
(State or Other Jurisdiction of  
Incorporation or Organization)

**3841**  
(Primary Standard Industrial  
Classification Code Number)

**33-0768598**  
(I R S Employer  
Identification Number)

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**10065 Old Grove Road  
San Diego, California 92131  
(858) 271-7070**

(Address, including zip code, and telephone number,  
including area code, of Registrant's principal executive offices)

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**Alexis V. Lukianov  
President and Chief Executive Officer  
NuVasive, Inc.**

**10065 Old Grove Road San Diego, California 92131  
(858) 271-7070**

(Name, address, including zip code, and telephone number,  
including area code, of agent for service)

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**Approximate date of commencement of proposed sale to the public:** As soon as practicable after this Registration Statement becomes effective

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, check the following box

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**CALCULATION OF REGISTRATION FEE**

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