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 19

20 **UNITED STATES DISTRICT COURT**

21 **SOUTHERN DISTRICT OF CALIFORNIA – SAN DIEGO DIVISION**

22 NUVASIVE, INC., a Delaware  
 corporation,  
 23

24 Plaintiff,

25 v.

26 ALPHATEC HOLDINGS, INC., a  
 Delaware corporation and ALPHATEC  
 SPINE, INC., a California corporation,  
 27

28 Defendants.

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

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

**DECLARATION OF BRIAN J.  
 NISBET IN SUPPORT OF  
 DEFENDANTS’ OPPOSITION TO  
 NUVASIVE’S MOTION FOR  
 PARTIAL SUMMARY JUDGMENT  
 AND MOTION TO EXCLUDE**

1 I, Brian J. Nisbet, declare as follows:

2 1. I am a partner with the law firm of Winston & Strawn LLP, counsel of  
3 record for defendants Alphatec Holdings, Inc. and Alphatec Spine, Inc. (individually  
4 and collectively, “Alphatec”). I have personal knowledge of the following facts and, if  
5 called as a witness, I could and would testify competently thereto.

6 2. **Exhibit 1** is a true and correct copy of the pages Bates stamped  
7 NUVA\_ATEC0252170 through NUVA\_ATEC0252175.

8 3. **Exhibit 2** is a true and correct copy of the pages Bates stamped  
9 NUVA\_ATEC0251803 through NUVA\_ATEC0251807.

10 4. **Exhibit 3** is a true and correct copy of U.S. Patent Application No.  
11 11/093,409 bearing Bates numbers NUVA\_ATEC0020856 through NUVA\_  
12 ATEC0020910.

13 5. **Exhibit 4** is a true and correct excerpt of the Patent Owner Preliminary  
14 Response Pursuant to 37 C.F.R. § 42.107 filed on April 17, 2019 in IPR2019-00361.

15 6. **Exhibit 5** is a true and correct excerpt of the transcript of the November 4,  
16 2020 deposition of Scott Robinson.

17 7. **Exhibit 6** is a true and correct excerpt of the December 18, 2020 Rebuttal  
18 Report of Barton L. Sachs, M.D.

19 8. **Exhibit 7** is a true and correct excerpt of the November 20, 2020 Corrected  
20 Opening Expert Report of Jim Youssef, M.D. Regarding U.S. Patent Nos. 8,361,156  
21 (’156 Patent) and 8,187,334 (’334 Patent).

22 9. **Exhibit 8** is a true and correct copy of Appellant’s Principal Brief filed in  
23 case no. 20-2245 pending before the United States Court of Appeals for the Federal  
24 Circuit.

25 10. **Exhibit 9** is a true and correct excerpt of the November 20, 2020 Opening  
26 Report of Barton L. Sachs, M.D.

27 11. **Exhibit 10** is a true and correct copy of the document marked as Exhibit 9  
28 at the January 11, 2021 deposition of Barton L. Sachs, M.D.

1           12.   **Exhibit 11** is a true and correct excerpt of the transcript of the January 11,  
2 2021 deposition of Barton L. Sachs, M.D.

3           13.   **Exhibit 12** is a true and correct copy of United States Patent Application  
4 Publication 2003/0028249 A1 (Bacelli et al.).

5           14.   **Exhibit 13** is a true and correct excerpt from The American Heritage  
6 Dictionary (Second College Edition 1991).

7           15.   **Exhibit 14** is a true and correct excerpt from The Concise Oxford  
8 Dictionary of Current English (Ninth Edition 1995).

9           16.   **Exhibit 15** is a true and correct excerpt from the Merriam-Webster's  
10 Collegiate Dictionary (Tenth Edition 2002).

11           17.   **Exhibit 16** is a true and correct excerpt of the transcript of the October 30,  
12 2020 deposition of Mike Aleali.

13           18.   **Exhibit 17** is a true and correct copy of the pages Bates stamped  
14 ATEC\_LLIF000001842 through ATEC\_LLIF000001846.

15           19.   **Exhibit 18** is a true and correct excerpt of the December 18, 2020 Rebuttal  
16 Expert Report of Jim Youssef, M.D.

17           20.   **Exhibit 19** is a true and correct copy of Defendants' September 18, 2020  
18 Response to Plaintiff Nu Vasive, Inc.'s Fifth Set of Interrogatories (No. 23).

19           21.   **Exhibit 20** is a true and correct excerpt of Defendants' September 18, 2020  
20 Supplemental Responses to Plaintiff Nu Vasive, Inc.'s Interrogatories (Nos. 1, 2, 3, 7,  
21 8, and 17).

22           22.   **Exhibit 21** is a true and correct excerpt of Defendants' November 3, 2020  
23 Amended Response to Plaintiff Nu Vasive, Inc.'s Fifth Set of Interrogatories (No. 23).

24           23.   **Exhibit 22** is a true and correct excerpt of Defendants' November 6, 2020  
25 Supplemental Responses to Plaintiff Nu Vasive, Inc.'s Interrogatories (Nos. 2, 7, 11 and  
26 17).

1           24.   **Exhibit 23** is a true and correct excerpt of Defendants’ October 26, 2020  
2 Responses and Objections to NuVasive, Inc.’s Third Amended Notice of Deposition of  
3 Alphatec Pursuant to Rule 30(b)(6).

4           25.   **Exhibit 24** is a true and correct copy of an email exchange between  
5 Defendants’ counsel and Plaintiff’s counsel on October 25, 2020.

6           26.   **Exhibit 25** is a true and correct excerpt of the transcript of the January 12,  
7 2021 deposition of Keith R. Ugone, Ph.D.

8           27.   **Exhibit 26** is a true and correct excerpt of the transcript of the January 13,  
9 2021 deposition of Jim Youssef, M.D.

10          28.   **Exhibit 27** is a true and correct excerpt of the transcript of the January 18,  
11 2021 deposition of Blake English.

12          29.   **Exhibit 28** is a true and correct excerpt of the transcript of the October 29,  
13 2019 deposition of Scott Robinson.

14          30.   **Exhibit 29** is a true and correct excerpt of the transcript of the December  
15 19, 2019 deposition of Mike Aleali.

16          31.   **Exhibit 30** is a true and correct copy of NuVasive, Inc.’s January 14, 2020  
17 Amended Second Notice of Deposition of Alphatec Holdings, Inc. and Alphatec Spine,  
18 Inc. Pursuant to Rule 30(b)(6).

19          32.   **Exhibit 31** is a true and correct excerpt of the transcript of the January 15,  
20 2020 deposition of Frank Chang.

21          33.   **Exhibit 32** is a true and correct excerpt of the November 22, 2019 Rebuttal  
22 Report of Barton L. Sachs, M.D.

23          34.   **Exhibit 33** is a true and correct excerpt of the December 18, 2020  
24 Supplemental Rebuttal Expert Report of Keith R. Ugone, Ph.D.

25          35.   **Exhibit 34** is a true and correct excerpt of the November 20, 2020  
26 Supplemental Expert Report of Blake English.

27  
28

1 I declare under penalty of perjury under the laws of the State of California and  
 2 the United States of America that the foregoing is true and correct. Executed this 16th  
 3 day of February 2021, at Chicago, Illinois.

4  
 5 */s/ Brian J. Nisbet*  
 6 **BRIAN J. NISBET**

7 **TABLE OF EXHIBITS**

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