

EXHIBIT 20

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

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17 ALPHATEC HOLDINGS, INC. and ALPHATEC SPINE, INC.

18
19 **UNITED STATES DISTRICT COURT**
20 **SOUTHERN DISTRICT OF CALIFORNIA**
21 **SAN DIEGO DIVISION**

22 NUVASIVE, INC., a Delaware
23 corporation,

24 Plaintiff,

25 v.

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

Defendants.

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

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

[Magistrate: Hon. Mitchell D. Dembin]

**DEFENDANTS’ SUPPLEMENTAL
RESPONSES TO PLAINTIFF
NUVASIVE, INC.’S
INTERROGATORIES (NOS. 1, 2, 3, 7, 8,
AND 17)**

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Complaint Filed: February 13, 2018

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3 PROPOUNDING PARTY: PLAINTIFF NUVASIVE, INC.

4 RESPONDING PARTY: DEFENDANTS ALPHATEC HOLDINGS, INC.

5 AND ALPHATEC SPINE, INC.

6 INTERROGATORIES.: NOS. 1, 2, 3, 7, 8, and 17

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9 Defendants Alphatec Holdings, Inc. and Alphatec Spine, Inc. (collectively,

10 “Alphatec” or “Defendants”) hereby provide supplemental responses to Plaintiff

11 NuVasive, Inc.’s (“Plaintiff”) Interrogatories (Nos. 1, 2, 3, 7, 8, and 17) as set forth in

12 the Court’s Scheduling Order (Doc. No. 293) under Rules 26 and 33 of the Federal

13 Rules of Civil Procedure and the applicable rules of this Court. These responses are

14 based on information reasonably available to the Defendants at this early stage of

15 litigation, prior to claim construction and fact discovery. The Defendants reserve the

16 right to amend and/or supplement these responses as necessary.

GENERAL OBJECTIONS

17

18 The following general objections apply to each of Plaintiff’s Interrogatories and

19 are incorporated by reference into each response made herein as though fully set forth

20 in each and every following Interrogatory response. The assertion of the same, similar,

21 or additional objections or the provision of partial answers in the individual responses

22 to these Interrogatories does not waive any of Defendants’ General Objections as set

23 forth below.

24 1. Defendants’ responses are made solely for the purpose of the above-

25 captioned litigation. The Defendants expressly reserve the right to object to the

26 admissibility or otherwise seek exclusion of the information disclosed in its responses.

27 2. Defendants have not completed their investigation, discovery or analysis

28 of all the facts of this case and have not completed preparation for trial. Accordingly,

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1 determined by examining the following documents: ATEC_LLIF000965524 -
2 ATEC_LLIF000965644; and ATEC_LLIF000965884 - ATEC_LLIF000965978.

3 These documents, produced in the form and manner maintained in the normal
4 course of business and without removal of any information, are the agendas for various
5 surgeon visits.

6 **INTERROGATORY NO. 7:**

7 Describe in detail the circumstances surrounding Alphatec’s knowledge of each
8 of the Patents-in-Suit and any Related Patent Application or Patent and any design-
9 around attempts for the Accused Products taken in light of Alphatec’s knowledge of
10 each patent or patent application.

11 **RESPONSE TO INTERROGATORY NO. 7:**

12 In addition to the General Objections, Defendants object to this Interrogatory as
13 compound and as containing multiple discrete subparts, which in the aggregate exceed
14 the number of interrogatories permissible under the CivLR 33.1(a).

15 Defendants further object to this Interrogatory as overbroad, unduly burdensome,
16 not relevant to the claims or defenses of this case, and not proportional to the needs of
17 the case, in requesting the “circumstances surrounding Alphatec’s knowledge . . . and
18 any design-around attempts.” Defendants further object to this Interrogatory as vague
19 and ambiguous as to “Alphatec’s knowledge.” Defendants further object to this
20 Interrogatory as overbroad, unduly burdensome, not relevant to the claims or defenses
21 of this case, and not proportional to the needs of the case to the extent that it requests
22 information about products other than the Accused Alphatec Components. Defendants
23 further object to the extent this Interrogatory seeks information protected from
24 discovery by the attorney-client privilege, the work product doctrine, or any other
25 privilege or immunity. Defendants further object to this Interrogatory as seeking
26 disclosure of private, confidential, trade secret, proprietary, or commercially and
27 competitively sensitive information, the disclosure of which would result in substantial
28 competitive injury to Defendants. Defendants expressly reserve the right to supplement

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1 Alphatec incorporates by reference the expert reports and the documents cited
2 therein of: Dr. Jim Youssef, Dr. Barton Sachs, Dr. Charles Branch, Blake English, Dr.
3 Keith Ugone, and Stephen Kunin.

4 **THIRD SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:**

5 Subject to and without waiver of all previously asserted General and Specific
6 objections regarding this Interrogatory, Alphatec supplements its previous response as
7 follows:

8 Alphatec had knowledge of the patents-in-suit from *Warsaw Orthopedic, Inc. v.*
9 *NuVasive Inc.*, No. 3:12-cv-02738, (Costabile Dep. Tr. 68:13–21), and was aware of
10 Medtronic’s IPRs and the subsequent appeals. Medtronic filed IPRs for the ’334 and
11 ’156 patents, both of which the PTAB instituted. In February 2015, the PTAB issued
12 Final Written Decisions, invalidating claims 1–5, 10, 11, 14–17, and 19–28 of the ’334
13 patent and claims 1–14, 19–20, and 23–27 of the ’156 patent. NuVasive appealed and
14 in late 2016, the Federal Circuit vacated and remanded the PTAB’s decision relating to
15 claims 16 and 17 of the ’334 patent and vacated the PTAB’s decision relating to ’156
16 patent for additional narrow findings regarding the motivation to combine prior art
17 references. The IPRs were subsequently terminated in 2017 pursuant to the parties
18 settling the litigation.

19 Because of the large, public lawsuit, the development team for the Battalion
20 lateral system was specifically instructed not to copy any competitor’s intellectual
21 property. Costabile Dep. Tr. 67:24–68:21. Indeed, no one on the development team
22 suggested it. *Id.*

23 There are several different non-infringing, clinically and commercially viable
24 design alternatives to Alphatec’s Battalion™ Lateral Spacers. For instance, alternative
25 designs in the prior art and/or on the market include different numbers, types, and/or
26 placements of the radiopaque markers that do not infringe one or more of the following
27 claim elements: (1) “first radiopaque marker [that] extends into said first sidewall at a
28 position proximate to said medial plane” as required by claim 1 of the ’156 Patent; (2)

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