

EXHIBIT 33

**TO DECLARATION OF CHRISTIANA GARRETT
IN SUPPORT OF NUVASIVE, INC.'S
REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MOTION TO EXCLUDE EXPERT OPINIONS
(IMPLANT PATENTS)**

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ALPHATEC HOLDINGS, INC. and ALPHATEC SPINE, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA – SAN DIEGO DIVISION

19 NUVASIVE, INC., a Delaware
20 corporation,

21 Plaintiff,

22 v.

23 ALPHATEC HOLDINGS, INC., a
24 Delaware corporation and
ALPHATEC SPINE, INC., a
25 California corporation,

26 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 INTERROGATORIS
NOS. 2, 7, 11, AND 17**

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27
28 Complaint Filed: February 13, 2018

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1 PROPOUNDING PARTY: PLAINTIFF NUVASIVE, INC.
2 RESPONDING PARTY: DEFENDANTS ALPHATEC HOLDINGS, INC.
3 AND ALPHATEC SPINE, INC.
4 INTERROGATORIES.: NOS. 2, 7, 11, AND 17
5

6 Defendants Alphatec Holdings, Inc. and Alphatec Spine, Inc. (collectively,
7 “Alphatec” or “Defendants”) hereby provide supplemental responses to Plaintiff
8 NuVasive, Inc.’s (“Plaintiff”) Interrogatories Nos. 2, 7, 11, and 17 as set forth in the
9 Court’s Scheduling Order (Doc. No. 293) under Rules 26 and 33 of the Federal Rules
10 of Civil Procedure and the applicable rules of this Court. These responses are based on
11 information reasonably available to the Defendants, prior to completion of fact
12 discovery and expert discovery related to the Implant Patents. The Defendants reserve
13 the right to amend and/or supplement these responses as necessary.

GENERAL OBJECTIONS

14
15 The following general objections apply to each of Plaintiff’s Interrogatories and
16 are incorporated by reference into each response made herein as though fully set forth
17 in each and every following Interrogatory response. The assertion of the same, similar,
18 or additional objections or the provision of partial answers in the individual responses
19 to these Interrogatories does not waive any of Defendants’ General Objections as set
20 forth below.

21 1. Defendants’ responses are made solely for the purpose of the above-
22 captioned litigation. The Defendants expressly reserve the right to object to the
23 admissibility or otherwise seek exclusion of the information disclosed in its responses.

24 2. Defendants have not completed their investigation, discovery or analysis
25 of all the facts of this case and have not completed preparation for trial. Accordingly,
26 all of the following responses are provided without prejudice to Defendants’ right to
27 introduce at trial any evidence that is subsequently discovered relating to proof of
28 presently known facts and to produce and introduce all evidence, whenever discovered,

1 Squadron retractor, Alphatec’s LLIF product offerings, LLIF interbody, and
2 information stating that Alphatec planned to develop and release a “next generation”
3 LLIF interbody in 2018. *E.g.* NUVA_ATEC0318805 at 0318823–24, 0318826,
4 0318829; NUVA_ATEC0318771; NUVA_ATEC0318760; NUVA_ATEC0319014.
5 NuVasive did not tell Alphatec that it believed Alphatec’s implant offerings might
6 infringe the ’156 patent and the ’334 patent. Alphatec relied on NuVasive’s silence
7 throughout that time period when it expended significant time and resources to launch
8 its lateral products.

9 NuVasive is also judicially estopped from taking positions that are contrary to
10 prior assertions concerning its damages claims, including whether posterior fixation
11 products are eligible for lost profits damages or irreparable harm.

12 **INTERROGATORY NO. 17:**

13 Separately and for each and every Patents-in-Suit, identify and describe in detail
14 any past, present or prospective alternative design or alternative method that You
15 contend to be an acceptable, non-infringing alternative to the Accused Products. Such
16 identification and description shall include an explanation of whether such alternative
17 design actually exists and is currently or has been used by Alphatec or others, a detailed
18 explanation of all steps Alphatec has taken to develop any alternative design (including,
19 but not limited to the timeline for such development, all costs and cost estimates related
20 to such development, and the people involved in such development), an explanation of
21 the availability of the alleged non-infringing alternative, and a detailed explanation of
22 whether and the extent to which Alphatec has taken any steps to implement any
23 alternative design, and to the extent Alphatec has not implemented a non-infringing
24 alternative described in response to this Interrogatory a detailed explanation of the
25 reasons Alphatec decided not to implement such non-infringing alternatives, including
26 an identification of all persons with knowledge of such facts and all documents relating
27 to the foregoing.

28

1 **RESPONSE TO INTERROGATORY NO. 17:**

2 In addition to the General Objections, Defendants object to this Interrogatory as
3 compound and as containing multiple discrete subparts, which in the aggregate exceed
4 the number of interrogatories permissible under the CivLR 33.1(a). For the same
5 reasons, this Interrogatory is unduly burdensome and overbroad. Defendants further
6 object to this Interrogatory as overbroad, unduly burdensome, not relevant to the claims
7 or defenses of this case, and not proportional to the needs of the case in requesting
8 information regarding “all steps” and seeking identification of “all persons with
9 knowledge” and “all documents relating to the foregoing.” Defendants further object
10 to this Interrogatory as unduly burdensome because the Interrogatory requests separate
11 identification for each patent-in-suit. Defendants further object to the extent this
12 Interrogatory seeks information protected from discovery by the attorney-client
13 privilege, the work product doctrine, or any other privilege or immunity. Defendants
14 further object to this Interrogatory as seeking disclosure of private, confidential, trade
15 secret, proprietary, or commercially and competitively sensitive information, the
16 disclosure of which would result in substantial competitive injury to Defendants.
17 Defendants further object to this Interrogatory as seeking to elicit premature expert
18 discovery. Defendants further object that this Interrogatory calls for legal conclusions.
19 Defendants object to this Interrogatory as duplicative of Interrogatory No. 7.

20 Subject to and without waiving the foregoing General and Specific Objections,
21 Defendants respond: Alphatec’s LLIF Squadron Retractor, Dilators, K-Wire,
22 Intradiscal Shim and Shim Inserter Tool, Battalion Lateral Spacer, 4th Blade, and Light
23 Cable/Light Source Connector do not infringe any valid claim of any asserted patent-
24 in-suit. In addition to Alphatec’s products, the following products constitute non-
25 infringing alternatives:

- 26 • Medtronic retractor systems and surgical techniques, including without
27 limitation Direct Lateral Interbody Fusion (DLIF) and MAST
28 QUADRANT DL;

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