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 ALPHATEC HOLDINGS, INC. AND ALPHATEC SPINE, INC.
 19

20 **UNITED STATES DISTRICT COURT**

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

22 NUVASIVE, INC., a Delaware
 23 corporation,

24 Plaintiff,

25 v.

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

28 Defendants.

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

**DEFENDANTS’ CONSOLIDATED
 RESPONSE TO NUVASIVE’S
 OBJECTIONS TO DEFENDANTS’
 DECLARATIONS IN SUPPORT OF
 THEIR OPPOSITION TO NUVASIVE’S
 MOTION FOR SUMMARY
 JUDGMENT**

Judge: Hon. Cathy Ann Bencivengo
Courtroom: 4C

1 Alphatec hereby responds to NuVasive’s objections to four declarations that
2 Alphatec submitted in support of its opposition to NuVasive’s motion for summary
3 judgment.

4 In support of its opposition to NuVasive’s summary judgment motion (Doc. No.
5 306), Alphatec attached supporting declarations from four Alphatec employees: (1)
6 Kelli Howell (Doc. No. 306-1); Matt Curran (Doc. No. 306-8); Scott Robinson (Doc.
7 No. 306-17); and Mike Aleali (Doc. No. 306-16). NuVasive then objected to portions
8 of each declaration. *See* Doc. No. 311-15 (Objections to Howell Declaration); Doc. No.
9 311-16 (Objections to Curran Declaration); Doc. No. 311-17 (Objections to Robinson
10 Declaration); Doc. No. 311-18 (Objections to Aleali Declaration).

11 The following chart details Alphatec’s responses to NuVasive’s objections to
12 each of these declarations. Alphatec’s responses relating to the Howell declaration
13 begin on page 2. Alphatec’s responses relating to the Curran declaration begin on page
14 11. Alphatec’s responses relating to the Robinson declaration begin on page 24.
15 Alphatec’s responses relating to the Aleali declaration begin on page 39.

16
17 Dated: March 5, 2021

WINSTON & STRAWN LLP

18 By: /s/ Nimalka R. Wickramasekera
19 NIMALKA R. WICKRAMASEKERA

20 Attorneys for Defendants
21 ALPHATEC HOLDINGS, INC. AND
22 ALPHATEC SPINE, INC.
23
24
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**DEFENDANTS' RESPONSES TO PLAINTIFF'S SPECIFIC EVIDENTIARY OBJECTIONS
TO DECLARATION OF KELLI HOWELL IN SUPPORT OF DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (IMPLANT PATENTS)**

Statement in Howell Declaration (Doc. No. 306-1)	NuVasive's Objections (Doc. No. 311-15)	Defendants' Response
¶ 1: "I make the following statements based on personal knowledge and if called to testify to them, could and would do so."		
¶ 2: "I am the Executive Vice President, Clinical Strategies at Alphatec Spine, Inc. ("Alphatec"). I have held this position since I joined Alphatec in March 2018. Before that, I worked for NuVasive, Inc. ("NuVasive") from November 1999 until March 2018."		
¶ 3: "I held various positions during my tenure at NuVasive. I began at NuVasive as a Project Manager in 1999. From August 2000 to July 2005, I worked as a Clinical Research and Education Manager. I then served as the Director of Clinical Resources from July 2005 to July 2011. From July 2011 to April 2012, I was the Senior Director of Clinical Resources. I then became the Vice President of Research in April 2012 and the Vice President of Research and Education in February 2015. Finally, I was the Vice President of Research and Health Informatics from January 2017 to March 2018."		

Statement in Howell Declaration (Doc. No. 306-1)	NuVasive's Objections (Doc. No. 311-15)	Defendants' Response
<p>¶ 4: “As part of my role as a Clinical Research and Education Manager, I was involved with NuVasive’s development and introduction of the XLIF procedure and accompanying lateral products, including the MaXcess retractor and CoRoent implants, and I documented aspects of the early procedures and uses of the lateral products. For example, I created a spreadsheet that collected data about procedures I had been notified about in late 2003 through 2004. Attached here as Exhibits A and B are true and correct copies of the spreadsheet I created that tracked these early procedures.”</p>		
<p>¶ 5: “As the title of the spreadsheet indicates, I collected information on “MaXcess XLIF-90 Surgeries.” Ex. A at NUVA_ATEC000115139. At a high level, this spreadsheet shows 145 commercial XLIF surgeries conducted by 20 different surgeons between January 2003 and December 2004 for which NuVasive products were used. <i>See Id.</i> at NUVA_ATEC000115141. As explained in more detail below, certain of those products that were commercially used are the CoRoent XL implants.”</p>	<p>Lack of Foundation [FRE 602]. There is no foundation or explanation of Ms. Howell’s claims regarding the “commercial XLIF surgeries” or use of the CoRoent XL implants.</p> <p>Impermissible Hearsay [FRE 802]. To the extent that Ms. Howell derives her knowledge regarding the alleged commercial use of the CoRoent XL implants from other NuVasive employees, these are out of court statements offered to prove the truth of the matter asserted.</p>	<p>Sufficient foundation. Ms. Howell provides sufficient foundation for her assertions. She attests that she held various roles at NuVasive over an almost twenty-year career. Doc. No. 306-1 ¶¶ 2–3. She also attests that as a Clinical Research and Education Manager, she was “involved with NuVasive’s development and introduction of the XLIF procedure and accompanying lateral products, including ... CoRoent implants.” Doc. No. 306-1 ¶ 4. To that end, Ms. Howell “created a spreadsheet that collected data” about NuVasive procedures, which she attached to her declaration as Exs. A and B. Doc. No.</p>

Statement in Howell Declaration (Doc. No. 306-1)	NuVasive's Objections (Doc. No. 311-15)	Defendants' Response
		<p>306-1 ¶ 4. Because she attests to creating the spreadsheet, she is in a position to discuss what it is and what it is not. For the same reason, Ms. Howell can attest to what the data she collected means and how it was prepared. At bottom, Ms. Howell has personal knowledge about the content reflected in that spreadsheet, which she created and falls squarely within her job responsibilities. NuVasive offers no evidence to the contrary. Indeed, NuVasive admits this spreadsheet shows that embodying CoRoent implants were publicly used in the United States before March 29, 2004. <i>See</i> Doc. No. 300-21 at 5.</p> <p>No hearsay objection. Ms. Howell never attests that she “derive[d] her knowledge regarding the alleged commercial use of the CoRoent XL implants from other NuVasive employees.” There is no out of court statement offered to prove the truth of the matter asserted. NuVasive’s objection thus fails.</p>
<p>¶ 6: “My goal in collecting this information was to assess the procedural utility of these early surgeries. This was not a formal study, nor was it a clinical trial, but</p>	<p>Lack of Foundation [FRE 602]. There is no foundation for Ms. Howell’s claims regarding whether this was not a formal study or whether the hospital and</p>	<p>Sufficient foundation. Ms. Howell provides sufficient foundation for her assertions. She attests that she held various roles at NuVasive over an almost</p>

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