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1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF CALIFORNIA
 3 SAN DIEGO DIVISION
 4
 5 NUVASIVE, INC., a Delaware
 corporation,
 6
 Plaintiff,
 7
 vs. Case No. 3:18-CV-00347
 8 -CAB-MDD
 ALPHATEC HOLDINGS, INC., a
 9 Delaware corporation and
 ALPHATEC SPINE, INC., a
 10 California corporation,
 11 Defendants.
 12
 13 Videotaped deposition of KELLI HOWELL, taken
 14 on behalf of the Plaintiff at 12235 El Camino Real,
 15 Suite 300, San Diego, California, beginning at
 16 9:06 a.m. and ending at 4:30 p.m., on June 1, 2018,
 17 before PATRICIA Y. SCHULER, Certified Shorthand
 18 Reporter No. 11949.
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 20
 21
 22
 23
 24
 25

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I-N-D-E-X

2 WITNESS: EXAMINATION
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 4 MR. TRIPODI II 6
 5 MS. WICKRAMASEKERA 214
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 Support of Defendants' Opposition
 to Plaintiff's Motion for
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 14 Exhibit 3 Document entitled "Exhibit C" 148
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1 APPEARANCES OF COUNSEL:
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 21 VIDEOGRAPHER:
 22 Huntington Paulson
 23 Also Present:
 24 Craig Hunsaker, Alphatec
 25 Greg Jackson, NuVasive

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1 SAN DIEGO, CALIFORNIA; FRIDAY, JUNE 1, 2018
 2 9:06 a.m.
 3 THE VIDEOGRAPHER: Good morning. We are
 4 on the record. My name is Huntington Paulson with
 5 San Diego U.S. Legal Support. This is the recorded
 6 video deposition of Kelli Howell in the matter of
 7 NuVasive versus Alphatec Holdings. The date is
 8 June 1st, 2018 at 9:06 a.m.
 9 Video and audio recording will be taking
 10 place at all times, unless all counsel agree to go
 11 off the record.
 12 Would all present today please introduce
 13 themselves, beginning with the witness.
 14 THE WITNESS: Kelli Howell.
 15 MS. WICKRAMASEKERA: Nimalka
 16 Wickramasekera from Winston & Strawn on behalf of
 17 Ms. Howell and the Alphatec defendants. And with
 18 me is Jason Hamilton and our corporate
 19 representative Craig Hunsaker.
 20 MR. TRIPODI II: On behalf of NuVasive,
 21 Inc., Paul Tripodi of Wilson, Sonsini, Goodrich &
 22 Rosati. With me today are Sara Siedlak, Christina
 23 Dashe, both of Wilson Sonsini, and Greg Jackson on
 24 behalf of NuVasive, Inc.
 25 THE VIDEOGRAPHER: The certified court



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1 reporter is Patricia Schuler. Would you please
2 swear in the witness.
3 KELLI HOWELL,
4 having been administered an oath, was examined and
5 testified as follows:
6
7 EXAMINATION
8 BY MR. TRIPODI II:
9 Q. Good morning, Ms. Howell.
10 A. Good morning.
11 Q. Ms. Howell, you understand you are under
12 oath today?
13 A. Yes.
14 Q. And is it your understanding also that
15 you are represented by counsel today?
16 A. Yes.
17 Q. Who is that?
18 A. Nimalka.
19 Q. Do you recall the first time that you met
20 Nimalka Wickramasekera?
21 A. Several years ago, actually.
22 Q. 2011 perhaps?
23 A. I don't recall the exact date.
24 Q. Do you recall testifying in trial in
25 2011?

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1 A. I do. I don't recall the exact date, but
2 if that's what you are referring to my interaction
3 with Numaca prior.
4 Q. Do you recall being cross-examined by her
5 at trial?
6 A. I recall that happened, yes.
7 Q. And she is your counsel today?
8 A. Yes.
9 Q. Do you find some irony in that?
10 A. Perhaps.
11 MS. WICKRAMASEKERA: Do you?
12 BY MR. TRIPODI II:
13 Q. So Ms. Howell, what is your understanding
14 of the reason that you are here today?
15 A. I suspect that it is because I provided a
16 declaration in response to a declaration provided
17 by Matt Link.
18 Q. When did you -- were you first contacted
19 with respect to the preparation of a declaration in
20 connection with the response to the declaration of
21 Matt Link?
22 MS. WICKRAMASEKERA: I want to caution
23 you on privilege not to reveal the substance of any
24 communications. But if you can recall a date, you
25 can provide that

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1 THE WITNESS: Specifically in response to
2 that declaration?
3 BY MR. TRIPODI II:
4 Q. Yes.
5 A. I can't recall the exact date. A couple
6 weeks ago.
7 Q. How did you decide what you were going to
8 include in your declaration?
9 MS. WICKRAMASEKERA: I'm going to
10 instruct you not to answer that on the basis of
11 privilege.
12 THE WITNESS: Per the instructions of my
13 attorney, I decline to respond to that question.
14 BY MR. TRIPODI II:
15 Q. Did you draft the declaration yourself?
16 A. Through conversation with the attorneys,
17 we collaborated on -- or I communicated with what
18 the message should include.
19 Q. Did you select the exhibits that you
20 referenced in your declaration?
21 A. No, I did not.
22 Q. Those were provided to you?
23 A. They were a part of the draft that was
24 created that I read and reviewed and agreed to and
25 signed off on.

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1 Q. Did you make any changes before you
2 signed it?
3 A. I did.
4 Q. Significant changes?
5 A. No. More, I would say, tone.
6 Q. What kind of changes to tone did you
7 make?
8 MS. WICKRAMASEKERA: I'm going to
9 instruct you not to answer on the basis of
10 privilege.
11 THE WITNESS: Per the advice of my
12 attorney, I will decline to answer that question.
13 BY MR. TRIPODI II:
14 Q. How long did you spend reviewing the
15 declaration before you signed it?
16 A. Probably -- I went back to it more than
17 once, so collectively, probably about four hours.
18 Q. On the final pass-through of the
19 declaration before you signed, how long did you
20 spend with it?
21 A. The final pass --
22 MS. WICKRAMASEKERA: Objection; asked and
23 answered.
24 THE WITNESS: The final pass-through was
25 part of that collective review of the document

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1 making edits, leaving, coming back to it, proofing
2 of my own edits, and then agreeing to sign it.
3 BY MR. TRIPODI II:
4 Q. Four hours. Is that your answer?
5 A. About.
6 Q. Do you believe your declaration to be
7 truthful?
8 A. I do.
9 Q. Do you understand you signed it under
10 penalty of perjury?
11 A. I do.
12 Q. Is there anything you would like to
13 correct, as you sit here right now?
14 A. No.
15 (Exhibit 1 was marked for identification.)
16 BY MR. TRIPODI II:
17 Q. I would like to mark as Exhibit 1 the
18 Declaration of Kelli Howell in Support of
19 Defendants' Opposition to Plaintiff's Motion for
20 Preliminary Injunction.
21 MS. WICKRAMASEKERA: Is this the witness
22 copy?
23 MR. TRIPODI II: The witness copy is
24 here.
25 THE WITNESS: Thank you.

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1 BY MR. TRIPODI II:
2 Q. Could you briefly describe, Ms. Howell,
3 which -- let me rephrase.
4 You took issue in your declaration with
5 five different statements that were made by
6 Mr. Link in his declaration; is that right?
7 MS. WICKRAMASEKERA: Objection.
8 Misstates the document.
9 BY MR. TRIPODI II:
10 Q. First of all, is this your declaration?
11 A. Yes, it is.
12 Q. Okay.
13 A. I don't know if I know by number, but I
14 will count.
15 As itemized, there were five with
16 detailed explanation and expounding on each.
17 Q. The first statement appears in paragraph
18 six. It says, "I take issue with Mr. Link's
19 statement that Alphatec began to target and hire
20 away key members of NuVasive's XLIF team, including
21 me."
22 Do you see that?
23 A. I do.
24 Q. The second statement appears in paragraph
25

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1 characterization of Alphatec's products as being
2 very similar, strikingly similar, and having
3 similar functionality to NuVasive products."
4 Do you see that?
5 A. I do.
6 Q. The first statement that appears in
7 paragraph 19 says, "Third, I would also like to
8 clarify Mr. Link's statement that NuVasive makes a
9 significant investment up front to loan or provide
10 the hospitals and surgeons with its retractor and
11 neuro monitoring systems, and then makes up the
12 difference in its initial investment with
13 specialized pricing for the implants and other
14 disposables, such as the dilators and releasable
15 shim."
16 Is that your statement?
17 A. Yes.
18 Q. And finally, in paragraph 23, it says,
19 "Fifth, I disagree with Mr. Link's assertion that
20 any specific surgeon-targeting by ex-NuVasive
21 personnel now at Alphatec is also likely to result
22 in additional irretrievably lost surgeons."
23 Do you see that?
24 A. I do.
25 MS. WICKRAMASEKERA: Actually, objection.

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1 You skipped the fourth, paragraph 21.
2 MR. TRIPODI II: My apologies.
3 BY MR. TRIPODI II:
4 Q. Paragraph 21, "Fourth, I would take issue
5 with Mr. Link's statement that Alphatec has the
6 ability to price its lateral products lower than
7 NuVasive's XLIF product."
8 Do you see that?
9 A. I do.
10 Q. And those are the five statements that
11 you took issue with?
12 A. Yes.
13 Q. Did you attempt to ascertain or form
14 opinions about the accuracy of the remaining
15 statements in the Link declaration?
16 A. I remember reading through the
17 declaration, and I have made comment to them, but
18 did not include them in this.
19 Q. So they didn't rise to the level of
20 something you felt you needed to respond to; is
21 that right?
22 A. Correct.
23 Q. Let's start with the first statement.
24 Actually, I want to backtrack and get some
25

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1 When did you join NuVasive?
2 A. In November of 1999.
3 Q. And when did you meet Mr. Miles?
4 A. In December of 2000.
5 Q. When did Mr. Miles become employed by
6 NuVasive?
7 MS. WICKRAMASEKERA: Objection; calls for
8 speculation.
9 THE WITNESS: I believe it was in January
10 of 2001.
11 BY MR. TRIPODI II:
12 Q. If you would, could you briefly describe
13 your role as an employee of NuVasive from the time
14 you arrived in 1991 until --
15 A. 1999.
16 Q. Excuse me. 1999. My mistake. From 1999
17 through September of 2016.
18 A. So I was hired in 1999 as a project
19 manager. I fairly quickly transitioned that
20 responsibility from project management to a
21 research-specific role, to a manager of clinical
22 research and education. So included surgeon
23 education and premarket and post-market research.
24 Through that role, evolved and was
25 promoted into successive titles within the same

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1 scope as director of research and education, senior
2 director of research, vice president of research
3 and education. I may not know the exact titles of
4 each of those, but successively through vice
5 president, most recently vice president of
6 clinical -- vice president of research and health
7 informatics was my last title.
8 Q. Over that period of time, you became very
9 familiar with NuVasive's products and procedures,
10 correct?
11 A. Yes.
12 Q. Were you aware that in September of 2016,
13 Mr. Miles announced that he was going to leave
14 NuVasive to join a company called Alphatec?
15 A. I don't remember the exact date, but I do
16 recall the event.
17 Q. How did you become aware of it?
18 A. I'm trying to recall. I don't recall how
19 I became aware of it. It became public knowledge.
20 Q. Did Mr. Miles tell you about it?
21 MS. WICKRAMASEKERA: Objection; asked and
22 answered.
23 THE WITNESS: It is possible. I don't
24 recall exactly how I became aware of it at the
25 time, but ultimately I was aware of it.

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1 BY MR. TRIPODI II:
2 Q. Did you become aware of it prior to the
3 time that he submitted a resignation to the
4 company?
5 A. I was not aware that he was going to
6 resign until after he resigned.
7 Q. Were you aware that he was talking to
8 Alphatec at that point in time?
9 A. I was not aware that he was talking to
10 Alphatec.
11 Q. He is a good friend of yours, right?
12 A. He is.
13 Q. A very good friend of yours, right?
14 A. I would classify that he is a friend
15 mine. He's been a mentor of mine as well for the
16 past 17 years.
17 Q. Did you ever travel with him on personal
18 trips?
19 A. I have.
20 Q. He's quite a good friend, then?
21 A. He is a good friend.
22 Q. So he did not tell you that he was going
23 to resign before he resigned?
24 A. Correct.
25 Q. What was your awareness at that point in

Page 17

1 time of the Alphatec product line, September 2016,
2 roughly the time of Mr. Miles' initial attempt to
3 depart for Alphatec?
4 A. I was not intimately aware of Alphatec's
5 product line per se. I was not familiar with what
6 kinds of devices they had for different procedures.
7 I was aware of them as a competitor in the space,
8 but not familiar with their product line and their
9 product portfolio.
10 Q. When you say "competitor in the space,"
11 what do you mean by that?
12 A. That they are another spine, medical
13 medical device company.
14 Q. Lateral spine company?
15 A. Not specifically, no.
16 Q. Did they have a lateral solution at that
17 point in time, September 2016?
18 A. I was not aware of one in September of
19 2016.
20 Q. Was it your job to know if there was a
21 competitive lateral offering?
22 A. No.
23 Q. No.
24 Was it your job to understand the
25 offerings of other companies in the lateral space

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1 at that point in time?
2 A. Not specifically, no.
3 Q. Did you ever prepare competitive
4 assessments of other companies at or around that
5 period of time?
6 A. My responsibilities would have included
7 comparisons mostly out of the published literature.
8 So not specifically head-to-head marketing
9 comparisons. That would be a role of the marketing
10 person.
11 Q. So if it appeared in the literature, you
12 would likely know about it?
13 A. Probably.
14 Q. Do you recall -- were you involved at all
15 in an investigation known as Project Titan at
16 NuVasive?
17 A. I don't recognize that name.
18 Q. Were you aware at all of a potential
19 investment opportunity that was provided by UBS
20 Financial to NuVasive for -- to make an investment
21 in Alphatec?
22 A. I was not.
23 Q. You were not aware of that at any time?
24 MS. WICKRAMASEKERA: I will caution you
25 regarding privilege. But outside the context of

Page 19

1 communications with attorneys, you can answer the
2 question.
3 THE WITNESS: I don't recognize the names
4 of the parties that you are referring to.
5 BY MR. TRIPODI II:
6 Q. When did you first become aware that
7 Alphatec had a commercially available lateral
8 solution?
9 A. I can't recall exactly. I may have been
10 aware that they had an implant for use in lateral
11 surgeries within the year leading up to NAS of
12 2017, in the same way that most spine companies
13 have a lateral implant for use in a lateral
14 procedure. I think the first time I saw that they
15 had a system for lateral was at NAS of 2017.
16 Q. And when was NAS in 2017?
17 A. I believe it was in October.
18 Q. So your first awareness, then, of a
19 lateral offering by Alphatec would have been in
20 October of 2017?
21 A. Roughly. It was not something that I had
22 in front of mind that I was concerned about a
23 product offering from Alphatec in the new lateral
24 space.
25 Q. Have you come at any point in time that

Page 20

1 Globus had purchased Alphatec's international
2 business?
3 A. I was.
4 Q. When did you become aware of that?
5 A. Probably right around the time that it
6 happened. It was industry news at the time.
7 Q. September 2016, roughly?
8 A. I'm not familiar with the dates, so I
9 don't recall the dates, but if that is when it
10 happened and it was publicly announced, that is
11 when I would have been aware of it.
12 Q. Sound about right timing-wise?
13 A. About right.
14 Q. What was your understanding of Alphatec's
15 business or the nature of its spine-related
16 business as of September 2016, roughly the time of
17 Pat's first attempt at a departure and roughly
18 about the time I will represent to you of the
19 Globus acquisition of the international business?
20 MS. WICKRAMASEKERA: Objection; vague.
21 THE WITNESS: What was my impression of
22 it?
23 BY MR. TRIPODI II:
24 Q. Your understanding. What did they sell?
25 A. I did not have, again, a detailed

Page 21

1 understanding of what their product line was, but
2 knowing that they were a competitor in the spinal
3 device space. And I had presumptions about what
4 they had in terms of pedicle screws and interbody
5 implants, but was not specifically aware of
6 flagship products or highly competitive devices at
7 the time.
8 Q. Were you surprised that Pat Miles wanted
9 to go to Alphatec in September of 2016?
10 A. I was surprised.
11 Q. Why?
12 A. Because, leading up to that time,
13 Alphatec did not have a very good reputation in the
14 space. Again, products that were not very
15 competitive enough to pay attention to, they had a
16 negative reputation in the space for business
17 practices, for their sales structure.
18 I understood that they were having
19 financial difficulties and were at the verge of
20 bankruptcy when they sold their international
21 business to Globus. It was a company in hardship.
22 Q. Did you talk to Mr. Miles about that?
23 A. At some point prior to that, we had
24 talked about the problems facing Alphatec, yes.
25 Q. What did you talk about specifically?

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