

Alphatec Holdings, Inc.
Form S-3/A
December 07, 2018

As filed with the Securities and Exchange Commission on December 7, 2018

Registration No. 333-221085

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Amendment No. 3 to
FORM S-3
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

Alphatec Holdings, Inc.
(Exact Name of Registrant as Specified in Its Charter)

Delaware

5818 El Camino Real
Carlsbad, CA 92008

20-2463898

| (State or other jurisdiction of incorporation or organization) | (760) 431-9286 (Address of Principal Executive Offices including Zip Code) | (I.R.S. Employer Identification No.) |
|---|---|---|
|---|---|---|

Patrick S. Miles

Chief Executive Officer

Alphatec Holdings, Inc.

5818 El Camino Real

Carlsbad, CA 92008

(760) 431-9286

(Name, address, including ZIP code, and telephone number, including area code, of agent for service)

Copies to:

Joshua E. Little, Esq.

Durham Jones & Pinegar, P.C.

192 E. 200 N., Third Floor

St. George, Utah 84770

(435) 674-0400

If the only securities being registered on this Form are being offered pursuant to dividend or interest reinvestment plans, please check the following box.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, other than securities offered only in connection with dividend or interest reinvestment plans, check the following box.

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective

registration statement for the same offering.

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a registration statement pursuant to General Instruction I.D. or a post-effective amendment thereto that shall become effective on filing with the Commission pursuant to Rule 462(e) under the Securities Act, check the following box.

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction I.D. filed to register additional securities or additional classes of securities pursuant to Rule 413(b) under the Securities Act, check the following box.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of large accelerated filer, accelerated filer, smaller reporting company and emerging growth company in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer
Non-accelerated filer

Accelerated filer
Smaller reporting company
Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of Securities Act.

CALCULATION OF REGISTRATION FEE

| Title of Each Class of Securities to be Registered | Amount to be Registered | Proposed Maximum Offering Share Price Per Share | Proposed Maximum Aggregate Offering Price | Amount of Registration Fee |
|--|-------------------------|---|---|----------------------------|
| Primary Offering | | | | |
| Common Stock, \$0.0001 par value | | | | |
| Preferred Stock, \$0.0001 par value | | | | |
| Debt Securities | | | | |
| Warrants | | | | |
| Unit | | | | |
| Total Primary Offering | (1)(2) | (1) | \$50,000,000(3) | \$6,060(4) |
| Secondary Offering | | | | |
| Common Stock, \$0.0001 par value | 845,000(2)(5) | \$2.945(6) | \$2,488,525 | \$302 |
| Total (Primary and Secondary) | | | | \$6,362(7) |

- (1) An unspecified number of securities or aggregate principal amount, as applicable, is being registered as may from time to time be offered at unspecified prices.
- (2) Pursuant to Rule 416 under the Securities Act of 1933, as amended (the Securities Act), the shares being registered hereunder include such unspecified number of each identified security as may be issuable with respect to the securities being registered hereunder as a result of stock splits, stock dividends or similar transactions and other adjustments.
- (3) Estimated solely for the purpose of calculating the registration fee. No separate consideration will be received for shares of common stock that are issued upon conversion of debt securities or preferred stock or upon exercise of common stock warrants registered hereunder. The aggregate maximum offering price of all securities issued pursuant to this registration statement will not exceed \$50,000,000.
- (4) The registration fee has been calculated in accordance with Rule 457(o) under the Securities Act.

- (5) Represents shares offered by selling stockholders, including shares of common stock issuable upon exercise of warrants, to be described more fully in prospectus supplements to be filed.
- (6) Estimated solely for the purpose of calculating the registration fee pursuant to Rule 457(c) under the Securities Act, and based upon the average of the high and low reported sales prices of our common stock on the NASDAQ Global Select Market on November 9, 2018.
- (7) Registration fee previously paid by registrant.

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933, as amended, or until this registration statement shall become effective on such date as the Securities and Exchange Commission, acting pursuant to said Section 8(a), may determine.

EXPLANATORY NOTE

This Amendment No. 3 is being filed solely for the purpose of filing an updated legal opinion of Durham, Jones & Pinegar, P.C. (Exhibit 5.1) to the Registration Statement on Form S-3 (Commission File No. 333-221085). No changes or additions are being made hereby to the Prospectus constituting Part I of the Registration Statement (not included herein) or to Items 14, 15 or 17 of Part II of the Registration Statement.

PART II
INFORMATION NOT REQUIRED IN PROSPECTUS**Item 14. Other Expenses of Issuance and Distribution**

The following is an estimate of the expenses (all of which are to be paid by the registrant) that we may incur in connection with the securities being registered hereby. The selling stockholder will not bear any of the expenses set forth below. However, the selling security holders will bear all commissions and discounts, if any, attributable to their sale of the securities.

| | |
|--|-------------|
| SEC registration fee | \$ 6,362(1) |
| FINRA filing fee | \$ (1) |
| Printing expenses | \$ (1) |
| Legal fees and expenses | \$ (1) |
| Accounting fees and expenses | \$ (1) |
| Transfer agent and trustee fees and expenses | \$ (1) |
| Miscellaneous | \$ (1) |
| Total | \$ (1) |

- (1) These fees are calculated based on the securities offered and the number of issuances and accordingly cannot be estimated at this time.

Item 15. Indemnification of Directors and Officers

Subsection (a) of Section 145 of the General Corporation Law of the State of Delaware, or the DGCL, empowers a corporation to indemnify any person who was or is a party or who is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful.

Subsection (b) of Section 145 empowers a corporation to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person acted in any of the capacities set forth above, against expenses (including attorneys fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances

of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

Section 145 further provides that to the extent a director or officer of a corporation has been successful on the merits or otherwise in the defense of any action, suit or proceeding referred to in subsections (a) and (b) of Section 145, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys fees) actually and reasonably incurred by such person in connection therewith; that indemnification provided for by Section 145 shall not be deemed exclusive of any other rights to which the

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indemnified party may be entitled; and the indemnification provided for by Section 145 shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of such person's heirs, executors and administrators. Section 145 also empowers the corporation to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify such person against such liabilities under Section 145.

Section 102(b)(7) of the DGCL provides that a corporation's certificate of incorporation may contain a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the DGCL, or (iv) for any transaction from which the director derived an improper personal benefit.

Our amended and restated certificate of incorporation provides that we shall indemnify, to the fullest extent authorized by the DGCL, each person who is involved in any litigation or other proceeding because such person is or was our director or officer or is or was serving as an officer or director of another entity at our request, against all expense, loss or liability reasonably incurred or suffered in connection therewith. Our amended and restated certificate of incorporation provides that the right to indemnification includes the right to be paid expenses incurred in defending any proceeding in advance of its final disposition, provided, however, that such advance payment will only be made upon delivery to us of an undertaking, by or on behalf of the director or officer, to repay all amounts so advanced if it is ultimately determined that such director is not entitled to indemnification. If we do not pay a proper claim for indemnification in full within 60 days after we receive a written claim for such indemnification, our amended and restated certificate of incorporation and our restated by-laws authorize the claimant to bring an action against us and prescribe what constitutes a defense to such action.

As permitted by Section 145 of the DGCL, we carry insurance policies insuring our directors and officers against certain liabilities that they may incur in their capacity as directors and officers.

We have entered into indemnification agreements with all of our directors. The indemnification agreements require us to indemnify these individuals to the fullest extent permitted by Delaware law and to advance expenses incurred by them in connection with any proceeding against them with respect to which they may be entitled to indemnification by us.

Item 16. Exhibits

(a) Exhibits

A list of exhibits filed with this registration statement on Form S-3 is set forth on the Exhibit Index and is incorporated herein by reference.

Item 17. Undertakings

(a) The undersigned registrant hereby undertakes:

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(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933;

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(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than 20 percent change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective registration statement; and

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement; *provided, however*, that paragraphs (a)(1)(i), (a)(1)(ii) and (a)(1)(iii) above do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement, or is contained in a form of prospectus filed pursuant to Rule 424(b) that is part of the registration statement.

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(4) That, for the purpose of determining liability under the Securities Act of 1933 to any purchaser:

(A) Each prospectus filed by the registrant pursuant to Rule 424(b)(3) shall be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement; and

(B) Each prospectus required to be filed pursuant to Rule 424(b)(2), (b)(5) or (b)(7) as part of a registration statement in reliance on Rule 430B relating to an offering made pursuant to Rule 415(a)(1)(i), (vii), or (x) for the purpose of providing the information required by Section 10(a) of the Securities Act of 1933 shall be deemed to be part of and included in the registration statement as of the earlier of the date such form of prospectus is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. As provided in Rule 430B, for liability purposes of the issuer and any person that is at that date an underwriter, such date shall be deemed to be a new effective date of the registration statement relating to the securities in the registration statement to which that prospectus relates, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. *Provided, however*, that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date.

(5) That, for the purpose of determining liability of the registrant under the Securities Act of 1933 to any purchaser in the initial distribution of securities:

The undersigned registrant undertakes that in a primary offering of securities of the undersigned registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the

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purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned registrant will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:

(i) Any preliminary prospectus or prospectus of the undersigned registrant relating to the offering required to be filed pursuant to Rule 424;

(ii) Any free writing prospectus relating to the offering prepared by or on behalf of the undersigned registrant or used or referred to by the undersigned registrant;

(iii) The portion of any other free writing prospectus relating to the offering prepared by or on behalf of the undersigned registrant or its securities provided by or on behalf of the undersigned registrant; and

(iv) Any other communications that is an offer in the offering made by the undersigned registrant to the purchaser.

(b) The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report pursuant to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

(h) Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

(j) The undersigned registrant hereby undertakes to file an application for the purpose of determining the eligibility of the trustee to act under subsection (a) of Section 310 of the Trust Indenture Act (the "Act") in accordance with the rules and regulations prescribed by the SEC under Section 305(b)(2) of the Act.

EXHIBIT INDEX

| Exhibit Number | Exhibit Description | Form | Incorporated by Reference | | |
|-------------------|--|-----------------------------|---------------------------|---------|------------------------------|
| | | | File No. | Exhibit | Filed Filing DateHerewith |
| 1.1(1) | Form of Underwriting Agreement | | | | |
| 3.1 | <u>Amended and Restated Certificate of Incorporation of Alphatec Holdings, Inc.</u> | Amendment No. 2 to Form S-1 | 333-131609 | 3.2 | 4/20/2006 |
| 3.2 | <u>Amendment to the Certificate of Incorporation of Alphatec Holdings, Inc.</u> | Form 8-K | 000-52024 | 3.1(B) | 8/24/2016 |
| 3.3 | <u>Certificate of Designations for Class A Preferred Stock</u> | Form 8-K | 000-52024 | 3.1 | 3/23/2017 |
| 3.4 | <u>Certificate of Designations for Class B Preferred Stock</u> | Form 8-K | 000-52024 | 3.1 | 3/12/2018 |
| 3.5 | <u>Restated Bylaws of Alphatec Holdings, Inc.</u> | Amendment No. 5 to Form S-1 | 333-131609 | 3.4 | 5/26/2006 |
| 4.1 | <u>Form of Common Stock Certificate</u> | Amendment No. 5 to Form S-1 | 333-131609 | 4.1 | 5/26/2006 |
| 4.2 | <u>Corporate Governance Agreement, dated December 17, 2009, between the Company and certain shareholders of Scient x Groupe S.A.S. and Scient x S.A.</u> | Form 8-K | 000-52024 | 10.1 | 12/22/2009 |
| 4.3 | <u>Registration Rights Agreement, dated March 26, 2010, by and among Alphatec Holdings, Inc. and the other signatories thereto</u> | Form 8-K | 000-52024 | 4.1 | 3/31/2010 |
| 4.4 | | Form 8-K/A | 000-52024 | 4.1 | 4/16/2018 |

Amended and Restated
Registration Rights
Agreement, dated
April 16, 2018, by and
among Alphatec
Holdings, Inc. and the
other
signatories thereto

4.5(2) Registration Rights
Agreement, dated
November 6, 2018, by
and among Alphatec
Holdings, Inc. and the
other
signatories thereto

4.6 Warrant with Silicon
Valley Bank as the
Warrant holder, dated
December 16, 2011

Form 10-K

000-52024

4.8

3/5/2012

| Exhibit Number | Exhibit Description | Form | Incorporated by Reference | | | Filed Herewith |
|-------------------|---|----------|---------------------------|---------|-------------|-------------------|
| | | | File No. | Exhibit | Filing Date | |
| 4.7 | <u>Form of Warrant issued to certain investors on March 28, 2017</u> | Form 8-K | 000-52024 | 4.1 | 3/23/2017 | |
| 4.8 | <u>Form of Warrant issued to certain investors on December 28, 2017</u> | Form 8-K | 000-52024 | 4.1 | 10/2/2017 | |
| 4.9 | <u>Form of Warrant issued to certain investors on March 8, 2018</u> | Form 8-K | 000-52024 | 4.1 | 03/12/2018 | |
| 4.10 | <u>Form of Warrant issued in connection with acquisition transaction on March 8, 2018</u> | Form 8-K | 000-52024 | 4.3 | 03/12/2018 | |
| 4.11(2) | <u>Form of Warrant issued in connection with financing on November 6, 2018</u> | | | | | |
| 4.12(1) | Form of Preferred Stock Certificate | | | | | |
| 4.13(2) | <u>Form of Indenture</u> | | | | | |
| 4.14(1) | Form of Debt Security | | | | | |
| 4.15(1) | Form of Warrant | | | | | |
| 4.16(1) | Form of Warrant Agreement | | | | | |
| 4.17(1) | Form of Unit Agreement | | | | | |
| 5.1 | <u>Opinion of Durham Jones & Pinegar, P.C.</u> | | | | | X |
| 23.1(2) | <u>Consent of Independent Registered Public Accounting Firm</u> | | | | | |
| 23.2(2) | <u>Consent of Independent Registered Public Accounting Firm</u> | | | | | |
| 23.3 | <u>Consent of Durham Jones & Pinegar, P.C. (included in Exhibit 5.1)</u> | | | | | X |
| 24.1(2) | <u>Powers of Attorney (included on signature pages hereto)</u> | | | | | |
| 25.1(1) | Statement of Eligibility of Trustee on Form T-1 | | | | | |

- (1) If applicable, to be filed by amendment or by a report filed under the Exchange Act and incorporated herein by reference.
- (2) Previously filed

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, as amended, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-3 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Carlsbad, State of California, on the 7th day of December, 2018.

ALPHATEC HOLDINGS, INC.

By: /s/ PATRICK S. MILES
Patrick S. Miles
Chief Executive Officer

Pursuant to the requirements of the Securities Act of 1933, as amended, this registration statement has been signed below by the following persons on behalf of the registrant in the capacities and on the dates indicated.

| Signature | Title(s) | Date |
|--|---|------------------|
| * Patrick S. Miles | Chairman and Chief Executive Officer (Principal Executive Officer) | December 7, 2018 |
| /s/ Jeffrey G. Black Jeffrey G. Black | EVP, Chief Financial Officer (Principal Financial Officer and Principal Accounting Officer) | December 7, 2018 |
| Evan Bakst | Director | |
| * Mortimer Berkowitz III | Director | December 7, 2018 |
| * Quentin Blackford | Director | December 7, 2018 |
| Jason Hochberg | Director | |
| * David H. Mowry | Director | December 7, 2018 |
| * Terry M. Rich | Director | December 7, 2018 |
| * Jeffrey P. Rydin | Director | December 7, 2018 |

Director

James L.L. Tullis

*

Director

December 7, 2018

Donald A. Williams

| Signature | Title(s) | Date |
|-------------------|-----------------|------------------|
| * Ward W. Wood | Director | December 7, 2018 |

* Pursuant to power of attorney

By: /s/ JEFFREY G. BLACK
Jeffrey G. Black