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**SECURITIES AND EXCHANGE COMMISSION**  
Washington, D.C. 20549

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**AMENDMENT NO. 4**  
**to**  
**FORM S-1**  
**REGISTRATION STATEMENT**  
**UNDER THE SECURITIES ACT OF 1933**

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**NuVasive, Inc.**

(Exact name of Registrant as specified in its charter)

**Delaware**  
(State or Other Jurisdiction of  
Incorporation or Organization)

**3841**  
(Primary Standard Industrial  
Classification Code Number)

**33-0768598**  
(I.R.S. Employer  
Identification Number)

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**10065 Old Grove Road**  
**San Diego, California 92131**  
**(858) 271-7070**

(Address, including zip code, and telephone number,  
including area code, of Registrant's principal executive offices)

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**Alexis V. Lukianov**  
**Chairman, President and Chief Executive Officer**  
**NuVasive, Inc.**

**10065 Old Grove Road San Diego, California 92131**  
**(858) 271-7070**

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

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**Copies to:**

**Michael S. Kagnoff, Esq.**  
**Ross L. Burningham, Esq.**  
**Jason M. Hannon, Esq.**  
**Heller Ehrman White & McAuliffe LLP**  
**4350 La Jolla Village Drive, 7<sup>th</sup> Floor**  
**San Diego, California 92130-2332**  
**(858) 450-8400**

**John A. de Groot, Esq.**  
**Taylor L. Stevens, Esq.**  
**Kenji L. Funahashi, Esq.**  
**Morrison & Foerster LLP**  
**3811 Valley Centre Drive, Suite 500**  
**San Diego, California 92122-1246**  
**(858) 720-5100**

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**Approximate date of commencement of proposed sale to the public:** As soon as practicable after this Registration Statement becomes effective.

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, 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, 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 post-effective amendment filed pursuant to Rule 462(d) 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 delivery of the prospectus is expected to be made pursuant to Rule 434, check the following box.

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**CALCULATION OF REGISTRATION FEE**

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<b>Title of Each Class of Securities to be Registered</b>	<b>Proposed Maximum Aggregate Offering Price(1)</b>	<b>Amount of Registration Fee</b>
Common Stock, par value \$.001 per share	\$97,175,000	\$12,312(2)

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- (1) Estimated solely for the purpose of calculating the amount of the registration fee pursuant to Rule 457(o) under the Securities Act of 1933.
- (2) Previously paid.

**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 or until the Registration Statement shall become effective on such date as the Commission, acting pursuant to Section 8(a), may determine.**

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## **EXPLANATORY NOTE**

NuVasive, Inc. has prepared this Amendment No. 4 to the Registration Statement on Form S-1 (No. 333-113344) for the purposes of filing with the Securities and Exchange Commission two additional exhibits to the Registration Statement and adding disclosure to Item 15 of Part II of the Registration Statement. This Amendment No. 4 does not modify any provision of the Prospectus that forms a part of the Registration Statement and accordingly such Prospectus has not been included herein.

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## Part II: Information Not Required in Prospectus

### Item 13. Other Expenses of Issuance and Distribution

The following table sets forth the costs and expenses, other than underwriting discounts and commissions, to be paid by us in connection with the sale of the common stock being registered. All amounts other than the SEC registration fee, the NASD filing fees and the Nasdaq National Market listing fee are estimates.

	Amount to be Paid
SEC registration fee	\$ 12,312
NASD filing fee	10,218
Nasdaq National Market application fee	5,000
Nasdaq National Market entry fee	95,000
Nasdaq National Market annual fee (prorated for 2004)	19,575
Legal fees and expenses	800,000
Accounting fees and expenses	500,000
Printing and engraving	200,000
Transfer agent and registrar fees	20,000
Miscellaneous	37,895
	<hr/>
Total	\$ 1,700,000

### Item 14. Indemnification of Directors and Officers

Section 145 of the Delaware General Corporation Law authorizes a court to award, or a corporation's board of directors to grant, indemnity to directors and officers in terms sufficiently broad to permit such indemnification under certain circumstances for liabilities (including reimbursement for expenses incurred) arising under the Securities Act of 1933, as amended (the "Securities Act").

As permitted by the Delaware General Corporation Law, our restated certificate of incorporation includes a provision that eliminates the personal liability of our directors for monetary damages for breach of fiduciary duty as a director, except for liability (1) for any breach of the director's duty of loyalty to us or our stockholders, (2) for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (3) under section 174 of the Delaware General Corporation Law (regarding unlawful dividends and stock purchases) or (4) for any transaction from which the director derived an improper personal benefit.

As permitted by the Delaware General Corporation Law, our restated bylaws provide that (1) we are required to indemnify our directors and officers to the fullest extent permitted by the Delaware General Corporation Law, subject to certain very limited exceptions, (2) we may indemnify our other employees and agents as set forth in the Delaware General Corporation Law, (3) we are required to advance expenses, as incurred, to our directors and executive officers in connection with a legal proceeding to the fullest extent permitted by the Delaware General Corporation Law, subject to certain very limited exceptions and (4) the rights conferred in the restated bylaws are not exclusive.

We have entered into indemnification agreements with each of our directors and executive officers to give such directors and officers additional contractual assurances regarding the scope of the indemnification set forth in our restated certificate of incorporation and to provide additional procedural protections. We also intend to enter into indemnification agreements with any new directors and executive officers in the future. At present, there is no pending litigation or proceeding involving any of our directors, officers, employees, or agents, other than the matters in Tennessee and California involving Medtronic, Inc., where indemnification by us will be required or permitted, and we are not

aware of any threatened litigation or proceeding, other than the Medtronic litigation, that may result in a claim for such indemnification. See "Risk Factors—We are currently involved in costly employment litigation and an adverse outcome may prevent certain of our employees from working for us or require us to pay significant damages," for further detail regarding the Medtronic litigation matters.

Section 8 of the Underwriting Agreement provides for indemnification by the underwriters of the officers, directors and controlling persons of the Registrant against certain liabilities, including liabilities arising under the Securities Act, in connection with matters specifically provided in writing by the underwriters for inclusion in the Registration Statement.

The indemnification provisions in our restated certificate of incorporation, restated bylaws and the indemnification agreements entered into between us and each of our directors and executive officers may be sufficiently broad to permit indemnification of our directors and executive officers for liabilities arising under the Securities Act.

We have obtained liability insurance for our officers and directors.

Reference is made to the following documents filed as exhibits to this Registration Statement regarding relevant indemnification provisions described above and elsewhere in this prospectus:

Document	Exhibit Number
Form of Underwriting Agreement	1.1
Form of Restated Certificate of Incorporation of Registrant	3.3
Form of Restated Bylaws of Registrant	3.5
Form of Indemnification Agreement for Directors and Officers	10.36

#### Item 15. Recent Sales of Unregistered Securities

From January 1, 2001 through March 31, 2004, we have issued the following securities that were not registered under the Securities Act of 1933, as amended (the "Securities Act"). The offers, sales and issuances of these securities were deemed to be exempt from registration under the Securities Act in reliance on Section 4(2) of the Securities Act, and/or Regulation D and the other rules and regulations promulgated thereunder, or Rule 701 promulgated under Section 3(b) of the Securities Act as transactions not involving a public offering or transactions under compensatory benefit plans and contracts relating to compensation as provided under such Rule 701. The recipients of securities in each such transaction represented their intention to acquire the securities for investment only and not with a view to or for sale in connection with any distribution thereof and appropriate legends were affixed to the share certificates and warrants issued in such transactions.

1. On February 14, 2001 and April 12, 2001, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued and sold convertible promissory notes in the aggregate principal amounts of \$3,000,000 and \$1,500,000, respectively, and warrants to purchase a variable number of shares of the class of our preferred stock issued in our next qualified equity financing. Upon completion of this financing, each of the investors held warrants to

purchase, at an exercise price of \$2.53 per share, the number of shares of our Series D preferred stock set forth in the following table opposite its name:

Investor	Number of Shares Underlying Warrants
Enterprise Management Partners, L.L.C	*
Enterprise Partners Annex Fund IV, L.P.	64,563
Enterprise Partners Annex Fund IV-A, L.P.	13,293
Kleiner Perkins Caufield & Byers VIII, L.P.	73,590
KPCB VIII Founders Fund, L.P.	4,267
Domain Partners IV, L.P.	49,655
DP IV Associates, L.P.	1,191

\* On February 14, 2001, Enterprise Management Partners, L.L.C. assigned the convertible promissory notes and warrants held by it to affiliated entities, Enterprise Partners Annex Fund IV, L.P. and Enterprise Partners Annex Fund IV-A, L.P.

2. On May 16, 2001, pursuant to the exemption provided in Section 3(a)(9) and Section 4(2) of the Securities Act, we issued and sold 11,675,791 shares of our Series D preferred stock at a per share purchase price of \$2.53 to existing stockholders and accredited investors, in consideration of cancellation of an aggregate of \$4,767,549.86 in our outstanding debt (and accrued interest on this debt) and an aggregate of \$24,772,201.37 in cash.
3. On December 27, 2001, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued warrants to purchase an aggregate of 23,716 shares of our Series D preferred stock at an exercise price of \$2.53 per share to GATX Ventures, Inc. in consideration for the extension of a line of credit to us for the purpose of financing the lease of capital equipment.
4. On January 16, 2002, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued a warrant to purchase 20,000 shares of our common stock at an exercise price of \$0.63 per underlying share to WWIP LLC in consideration for clinical advisory consulting services provided to us.
5. On October 10, 2002, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued a warrant to purchase 60,000 shares of our common stock at an exercise price of \$0.63 per underlying share to Spine Partners, LLC in partial consideration for certain intellectual property transferred to us by Spine Partners.
6. Between July 11, 2002 and July 17, 2003, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued and sold an aggregate of 9,897,640 shares of our Series D-1 preferred stock at a purchase price of \$2.53 per share and warrants to purchase an aggregate of 1,658,711 shares of our common stock to the investors set forth below. The total consideration paid for such shares and warrants was \$24,995,165.69. The exercise price per underlying share of the warrants is \$0.63. In February and March 2004, we issued and sold an

aggregate of 21,342 shares of our common stock upon exercise of certain of such warrants in consideration for an aggregate purchase price of \$13,338.75.

Enterprise Partners Annex Fund IV, L.P.	SSI Spinal Solutions
Enterprise Partners Annex Fund IV-A, L.P.	James Gleason
Kleiner Perkins Caufield & Byers VIII, L.P.	Anthony Ross
KPCB VIII Founders Fund, L.P.	Jeff Hughes
Domain Partners IV, L.P.	R. Jay Thabet, Jr.
Caisse de depot et placement du Quebec	Integral Capital Partners VI, L.P.
A.M. Pappas Life Science Ventures II, L.P.	Ronald C. Childs
William Blair Capital Partners VII, L.P.	Tom L. Meyer III
William Blair Capital Partners VII QP, L.P.	Gregg Lacoste
Johnson & Johnson Development Corporation	William Houston, Jr.
Innovative Orthotics & Rehabilitation Inc.	Behrooz A. Akbarnia
David Merrill	Sam & Dawn Maywood
Klaus Hagenmeyer	Bruce & Nina Van Dam
Frederick J. Thabet	Scot Martinelli & Bobbi-Jo Romanishan
Craig Sparks	MLPF&S William Player Barefoot IRA
Todd Marinchak	Scott Kitchel
Peter A. Guagliano	Rudolph Bertagnoli
Regis W. Haid, Jr.	Jonathan Spangler
Mark D. Peterson	Anthony Salerni
Alexander & Majorie Vaccaro	Kevin Armstrong
G. Rogan Fry	Andrew Cappuccino
Joe C. Loy	
Keith Valentine	

7. On July 31, 2002, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued a warrant to purchase 3,423 shares of our common stock at an exercise price of \$0.63 per underlying share to Callaway Private Equity Partners, Inc. in consideration for services rendered to us in connection with the identification of investors in our Series D-1 preferred stock financing.
8. On January 9, 2003, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued a warrant to purchase 10,268 shares of our common stock at an exercise price of \$0.63 per underlying share to Comerica Bank-California in consideration for providing us with an accounts receivable line of credit and loans to finance the purchase by us of capital equipment.
9. On January 9, 2003, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued a warrant to purchase 59,289 shares of our Series D-1 preferred stock at an exercise price of \$2.53 per underlying share to Comerica Bank-California in consideration for providing us with an accounts receivable line of credit and loans to finance the purchase by us of capital equipment.
10. On March 12, 2004, pursuant to the exemption provided in Section 4(2) of the Securities Act, we issued a warrant to purchase 45,000 shares of our Series D-1 preferred stock at an exercise price of \$4.30 per underlying share to Comerica Bank in consideration for providing us with an increase in an accounts receivable line of credit and loans to finance the purchase by us of capital equipment.
11. From January 1, 2001 to March 31, 2004, pursuant to exemptions from registration provided in Section 4(2) or Section 3(b) of the Securities Act or under Rule 701, we have granted

options to purchase an aggregate of 3,436,600 shares of our common stock to our directors, employees and consultants under our 1998 Plan at exercise prices ranging from \$0.63 to \$10.75 per share. Of the 3,436,600 shares granted, 2,179,083 shares remain outstanding, 920,964 have been exercised and 336,553 shares have been canceled and returned to our 1998 Plan.

12. Between January 1, 2001 and March 31, 2004, pursuant to the exemptions provided in Section 4(2) of the Securities Act and Rule 701, we have issued 1,600,923 shares of our common stock to our directors, employees and consultants upon exercise of options granted under our 1998 Plan in consideration for an aggregate purchase price of \$958,564.51.
13. On April 24, 2004, and May 4, 2004, pursuant to the exemptions provided in Section 4(2) of the Securities Act and Rule 701, we issued 27,200 shares of our common stock, at a purchase price of \$10.75 per share, to certain of our consultants and distributors in consideration for past services rendered to us.

#### Item 16. Exhibits and Financial Statement Schedules

Exhibit Number	Description
1.1**	Form of Underwriting Agreement
3.1**	Amended and Restated Certificate of Incorporation, as currently in effect
3.2**	Certificate of Amendment of Amended and Restated Certificate of Incorporation, as currently in effect
3.3**	Form of Restated Certificate of Incorporation (to be filed in connection with the closing of this offering)
3.4**	Bylaws, as currently in effect
3.5**	Form of Restated Bylaws (to be effective upon the closing of this offering)
3.6**	Form of Certificate of Amendment of Amended and Restated Certificate of Incorporation (to be filed on or before the effective date of this offering)
4.1**	Second Amended and Restated Investors' Rights Agreement, dated July 11, 2002, by and among us and the other parties named therein
4.2**	Amendment No. 1 to Second Amended and Restated Investors' Rights Agreement, dated June 19, 2003, by and among us and the other parties named therein
4.3**	Amendment No. 2 to Second Amended and Restated Investors' Rights Agreement, dated February 5, 2004, by and among us and the other parties named therein
4.4**	Specimen Common Stock Certificate
5.1**	Opinion of Heller Ehrman White & McAuliffe LLP
10.1**	Form of Warrant to purchase Series B Preferred Stock, dated October 13, 1999, between us and each of the persons listed on the Schedule of Warrant Holders attached thereto
10.2**	Warrant Agreement to Purchase Shares of Series A Preferred Stock, dated September 17, 1999, issued by us to Comdisco Ventures, Inc.
10.3**	Warrant Agreement to Purchase Shares of Series A Preferred Stock, dated September 17, 1999, issued by us to CNC Holdings I LLC

- 10.4\*\* Stock Subscription Warrant to Purchase Series B Preferred Stock, dated June 27, 2000, issued by us to TBCC Funding Trust II
- 10.5\*\* Form of Warrant to purchase Series D Preferred Stock used by us to issue warrants on February 14, 2001 and April 12, 2001 to each of the persons listed on the Schedule of Warrant Holders attached thereto
- 10.6\*\* Warrant to Purchase 22,530 Shares of Series D Preferred Stock, dated December 27, 2001, issued by us to GATX Ventures, Inc.
- 10.7\*\* Warrant to Purchase 1,186 Shares of Series D Preferred Stock, dated December 27, 2001, issued by us to GATX Ventures, Inc.
- 10.8\*\* Warrant to Purchase Common Stock, dated January 9, 2003, issued by us to Comerica Bank—California
- 10.9\*\* Warrant to Purchase Series D-1 Preferred Stock, dated January 9, 2003, issued by us to Comerica Bank—California
- 10.10\*\* Form of Warrant to purchase Common Stock used by us to issue warrants in connection with our sale of Series D-1 Preferred Stock to the persons listed on the Schedule of Warrant Holders attached thereto
- 10.11\*\*# 1998 Stock Option/Stock Issuance Plan
- 10.12\*\*# Form of Notice of Grant of Stock Option under our 1998 Stock Option/Stock Issuance Plan
- 10.13\*\*# Form of Stock Option Agreement under our 1998 Stock Option/Stock Issuance Plan, and form of addendum thereto
- 10.14\*\*# Form of Stock Purchase Agreement under our 1998 Stock Option/Stock Issuance Plan
- 10.14.1# Form of Stock Issuance Agreement under our 1998 Stock Option/Stock Issuance Plan
- 10.14.2# Form of Stock Issuance Agreement issued to consultants and distributors, under our 1998 Stock Option/Stock Issuance Plan, on April 21, 2004, and May 4, 2004
- 10.15\*\*# 2004 Equity Incentive Plan
- 10.16\*\*# Form of Stock Option Award Notice under 2004 Equity Incentive Plan
- 10.17\*\*# Form of Option Exercise and Stock Purchase Agreement under 2004 Equity Incentive Plan
- 10.18\*\*# Forms of Restricted Stock Grant Notice and Restricted Stock Agreement under 2004 Equity Incentive Plan
- 10.18.1\*\*# Form of Restricted Stock Unit Award Agreement under 2004 Equity Incentive Plan
- 10.19\*\*# 2004 Employee Stock Purchase Plan
- 10.20\*\* Standard Industrial/Commercial Multi-Tenant Lease—Modified Net, dated July 13, 1999, between us and Michael L. Hightower
- 10.21\*\* Addendum to Lease Between EUS Partners, the Successor to Michael L. Hightower, Lessor, and NuVasive, Inc. as Lessee, dated March 25, 2002

- 10.22\*\* Equipment Loan and Security Agreement, dated December 27, 2001, between us and GATX Ventures, Inc., Loan Agreement Supplement No. 1, dated December 31, 2001, and Loan Agreement Supplement No. 2, dated July 31, 2002
- 10.23\*\*† Patent Purchase Agreement, dated June 21, 2002, between us and Drs. Anthony Ross and Peter Guagliano
- 10.24\*\*† Intellectual Property Purchase Agreement, dated October 10, 2002, between us and Spine Partners, LLC
- 10.25\*\*† Development, Production and Marketing Services Agreement, dated December 30, 1999, as amended, by and among us and Tissue Banks International, Inc.
- 10.26\*\*† Supply Agreement, dated January 21, 2002, by and among us and Intermountain Tissue Center
- 10.27\*\*# Employment Letter Agreement, dated July 12, 1999, as amended on January 20, 2004, between us and Alexis V. Lukianov
- 10.28\*\*# Bonus Agreement, dated February 25, 2000, between us and Alexis V. Lukianov
- 10.29\*\*# Employment Agreement, dated December 20, 2002, as amended on January 20, 2004, between us and Kevin C. O'Boyle
- 10.30\*\*# Employment Agreement, dated January 20, 2004, between us and Keith Valentine
- 10.31\*\*# Employment Agreement, dated January 20, 2004, between us and G. Rogan Fry
- 10.32\*\*# Employment Agreement, dated January 20, 2004, between us and Patrick Miles
- 10.33\*\*# Employment Agreement, dated January 20, 2004, between us and James J. Skinner
- 10.34\*\*# Employment Agreement, dated January 20, 2004, between us and G. Bryan Cornwall
- 10.35\*\*# Employment Agreement, dated January 20, 2004, between us and Jonathan D. Spangler
- 10.36\*\* Form of Indemnification Agreement between us and our directors and officers
- 10.37\*\* Common Stock Purchase Warrant, dated January 16, 2002, issued by us to WWIP LLC
- 10.38\*\*† Clinical Advisor, Patent Purchase and Development Agreement, dated March 31, 2004, between us and James L. Chappuis
- 10.39\*\* Loan and Security Agreement, dated January 9, 2003, as amended, between us and Comerica Bank
- 10.40\*\* Warrant to Purchase Series D-1 Preferred Stock, dated March 12, 2004, issued by us to Comerica Bank
- 21.1\*\* List of our subsidiaries
- 23.1\*\* Consent of Ernst & Young LLP, independent auditors
- 23.2\*\* Consent of Heller Ehrman White & McAuliffe LLP (included in Exhibit 5.1)
- 24.1\*\* Power of Attorney

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\*\* Previously filed.

† Application has been made to the Securities and Exchange Commission to seek confidential treatment of certain provisions of this exhibit under Rule 406 of the Securities Act of 1933. Omitted material for which confidential treatment has been requested has been filed separately with the Securities and Exchange Commission.

# Indicates management contract or compensatory plan.

## Item 17. Undertakings

The undersigned registrant hereby undertakes to provide to the underwriters at the closing specified in the underwriting agreement, certificates in such denominations and registered in such names as required by the underwriters to permit prompt delivery to each purchaser.

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.

The undersigned registrant hereby undertakes that:

(1) For purposes of determining any liability under the Securities Act, the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424 (b)(1) or (4), or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective; and

(2) For the purpose of determining any liability under the Securities Act, each post-effective amendment that contains a form of prospectus 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.

## SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, as amended, the Registrant has duly caused this Amendment No. 4 to Registration Statement (No. 333-113344) to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of San Diego, California on this 11<sup>th</sup> day of May, 2004.

NUVASIVE, INC.

By:

*/s/ ALEXIS V. LUKIANOV*

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Alexis V. Lukianov  
*President, Chief Executive Officer and Chairman of the Board*

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Pursuant to the requirements of the Securities Act of 1933, as amended, this Amendment No. 4 to Registration Statement (No. 333-113344) has been signed by the following persons in the capacities indicated on May 11, 2004:

Signature	Title(s)
/s/ ALEXIS V. LUKIANOV	<b>Alexis V. Lukianov</b> President, Chief Executive Officer, and Chairman of the Board (principal executive officer)
*	<b>Kevin C. O'Boyle</b> Vice President, Finance and Chief Financial Officer (principal financial and accounting officer)
*	<b>R. Lewis Bennett, Sr.</b> Director
*	<b>Jack R. Blair</b> Director
*	<b>James C. Blair, Ph.D.</b> Director
*	<b>Lesley H. Howe</b> Director
*	<b>Joseph S. Lacob</b> Director
*	<b>Arda M. Minocherhomjee, Ph.D.</b> Director

\*By: /s/ ALEXIS V. LUKIANOV

Alexis V. Lukianov  
Attorney-in-fact

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  - 10.25\*\*† Development, Production and Marketing Services Agreement, dated December 30, 1999, as amended, by and among us and Tissue Banks International, Inc.
  - 10.26\*\*† Supply Agreement, dated January 21, 2002, by and among us and Intermountain Tissue Center
  - 10.27\*\*# Employment Letter Agreement, dated July 12, 1999, as amended on January 20, 2004, between us and Alexis V. Lukianov
  - 10.28\*\*# Bonus Agreement, dated February 25, 2000, between us and Alexis V. Lukianov
  - 10.29\*\*# Employment Agreement, dated December 20, 2002, as amended on January 20, 2004, between us and Kevin C. O'Boyle
  - 10.30\*\*# Employment Agreement, dated January 20, 2004, between us and Keith Valentine
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- 10.31\*\*# Employment Agreement, dated January 20, 2004, between us and G. Rogan Fry
- 10.32\*\*# Employment Agreement, dated January 20, 2004, between us and Patrick Miles
- 10.33\*\*# Employment Agreement, dated January 20, 2004, between us and James J. Skinner
- 10.34\*\*# Employment Agreement, dated January 20, 2004, between us and G. Bryan Cornwall
- 10.35\*\*# Employment Agreement, dated January 20, 2004, between us and Jonathan D. Spangler
- 10.36\*\* Form of Indemnification Agreement between us and our directors and officers
- 10.37\*\* Common Stock Purchase Warrant, dated January 16, 2002, issued by us to WWIP LLC
- 10.38\*\*† Clinical Advisor, Patent Purchase and Development Agreement, dated March 31, 2004, between us and James L. Chappuis
- 10.39\*\* Loan and Security Agreement, dated January 9, 2003, as amended, between us and Comerica Bank
- 10.40\*\* Warrant to Purchase Series D-1 Preferred Stock, dated March 12, 2004, issued by us to Comerica Bank
- 21.1\*\* List of our subsidiaries
- 23.1\*\* Consent of Ernst & Young LLP, independent auditors
- 23.2\*\* Consent of Heller Ehrman White & McAuliffe LLP (included in Exhibit 5.1)
- 24.1\*\* Power of Attorney

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\*\* Previously filed.

† Application has been made to the Securities and Exchange Commission to seek confidential treatment of certain provisions of this exhibit under Rule 406 of the Securities Act of 1933. Omitted material for which confidential treatment has been requested has been filed separately with the Securities and Exchange Commission.

# Indicates management contract or compensatory plan.

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QuickLinks

[EXPLANATORY NOTE](#)

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**NUVASIVE, INC.  
STOCK ISSUANCE AGREEMENT**

**AGREEMENT** made as of this            day of            200    , by and between NuVasive, Inc., a Delaware corporation, and            , Participant in the Corporation's 1998 Stock Option/Stock Issuance Plan.

All capitalized terms in this Agreement shall have the meaning assigned to them in this Agreement or in the attached Appendix.

**A. PURCHASE OF SHARES**

1. **Purchase.** Participant hereby purchases            shares of Common Stock (the "Purchased Shares") pursuant to the provisions of the Stock Issuance Program at the purchase price of \$            per share (the "Purchase Price").

2. **Payment.** Concurrently with the delivery of this Agreement to the Corporation, Participant shall pay the Purchase Price for the Purchased Shares in cash or cash equivalent and shall deliver a duly-executed blank Assignment Separate from Certificate (in the form attached hereto as Exhibit I) with respect to the Purchased Shares.

3. **Stockholder Rights.** Until such time as the Corporation exercises the Repurchase Right or the First Refusal Right, Participant (or any successor in interest) shall have all stockholder rights (including voting, dividend and liquidation rights) with respect to the Purchased Shares, subject, however, to the transfer restrictions of Articles B and C.

**B. SECURITIES LAW COMPLIANCE**

1. **Restricted Securities.** The Purchased Shares have not been registered under the 1933 Act and are being issued to Participant in reliance upon the exemption from such registration provided by SEC Rule 701 for stock issuances under compensatory benefit plans such as the Plan. Participant hereby confirms that Participant has been informed that the Purchased Shares are restricted securities under the 1933 Act and may not be resold or transferred unless the Purchased Shares are first registered under the Federal securities laws or unless an exemption from such registration is available. Accordingly, Participant hereby acknowledges that Participant is prepared to hold the Purchased Shares for an indefinite period and that Participant is aware that SEC Rule 144 issued under the 1933 Act which exempts certain resales of unrestricted securities is not presently available to exempt the resale of the Purchased Shares from the registration requirements of the 1933 Act.

2. **Disposition of Purchased Shares.** Participant shall make no disposition of the Purchased Shares (other than a Permitted Transfer) unless and until there is compliance with all of the following requirements:

(i) Participant shall have provided the Corporation with a written summary of the terms and conditions of the proposed disposition.

(ii) Participant shall have complied with all requirements of this Agreement applicable to the disposition of the Purchased Shares.

(iii) Participant shall have provided the Corporation with written assurances, in form and substance satisfactory to the Corporation, that (a) the proposed disposition does not require registration of the Purchased Shares under the 1933 Act or (b) all appropriate action necessary for compliance with the registration requirements of the 1933 Act or any exemption from registration available under the 1933 Act (including Rule 144) has been taken.

The Corporation shall *not* be required (i) to transfer on its books any Purchased Shares which have been sold or transferred in violation of the provisions of this Agreement or (ii) to treat as the owner of the Purchased Shares, or otherwise to accord voting, dividend or liquidation rights to, any

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transferee to whom the Purchased Shares have been transferred in contravention of this Agreement.

3. **Restrictive Legends.** The stock certificates for the Purchased Shares shall be endorsed with one or more of the following restrictive legends:

"The shares represented by this certificate have not been registered under the Securities Act of 1933. The shares may not be sold or offered for sale in the absence of (a) an effective registration statement for the shares under such Act, (b) a "no action" letter of the Securities and Exchange Commission with respect to such sale or offer or (c) satisfactory assurances to the Corporation that registration under such Act is not required with respect to such sale or offer."

"The shares represented by this certificate are subject to certain repurchase rights and rights of first refusal granted to the Corporation and accordingly may not be sold, assigned, transferred, encumbered, or in any manner disposed of except in conformity with the terms of a written agreement dated \_\_\_\_\_, 200\_\_\_\_ between the Corporation and the registered holder of the shares (or the predecessor in interest to the shares). A copy of such agreement is maintained at the Corporation's principal corporate offices."

#### C. **TRANSFER RESTRICTIONS**

1. **Restriction on Transfer.** Except for any Permitted Transfer, Participant shall not transfer, assign, encumber or otherwise dispose of any of the Purchased Shares which are subject to the Repurchase Right. In addition, Purchased Shares which are released from the Repurchase Right shall not be transferred, assigned, encumbered or otherwise disposed of in contravention of the First Refusal Right or the Market Stand-Off.

2. **Transferee Obligations.** Each person (other than the Corporation) to whom the Purchased Shares are transferred by means of a Permitted Transfer must, as a condition precedent to the validity of such transfer, acknowledge in writing to the Corporation that such person is bound by the provisions of this Agreement and that the transferred shares are subject to (i) the Repurchase Right, (ii) the First Refusal Right and (iii) the Market Stand-Off, to the same extent such shares would be so subject if retained by Participant.

3. **Market Stand-Off.**

(a) In connection with any underwritten public offering by the Corporation of its equity securities pursuant to an effective registration statement filed under the 1933 Act, including the Corporation's initial public offering, Owner shall not sell, make any short sale of, loan, hypothecate, pledge, grant any option for the purchase of, or otherwise dispose or transfer for value or otherwise agree to engage in any of the foregoing transactions with respect to, any Purchased Shares without the prior written consent of the Corporation or its underwriters. Such restriction (the "Market Stand-Off") shall be in effect for such period of time from and after the effective date of the final prospectus for the offering as may be requested by the Corporation or such underwriters. In no event, however, shall such period exceed one hundred eighty (180) days and the Market Stand-Off shall in all events terminate two (2) years after the effective date of the Corporation's initial public offering.

(b) Owner shall be subject to the Market Stand-Off *provided and only if* the officers and directors of the Corporation are also subject to similar restrictions.

(c) Any new, substituted or additional securities which are by reason of any Recapitalization or Reorganization distributed with respect to the Purchased Shares shall be immediately subject to the Market Stand-Off, to the same extent the Purchased Shares are at such time covered by such provisions.

(d) In order to enforce the Market Stand-Off, the Corporation may impose stop-transfer instructions with respect to the Purchased Shares until the end of the applicable stand-off period.

#### D. **REPURCHASE RIGHT**

1. **Grant.** The Corporation is hereby granted the right (the "Repurchase Right"), exercisable at any time during the sixty (60)-day period following the date Participant ceases for any reason to remain in Service, to repurchase at the Purchase Price any or all of the Purchased Shares in which Participant is not, at the time of his or her cessation of Service, vested in accordance with the provisions of the Vesting Schedule set forth in Paragraph D.3 or the special vesting acceleration provisions of Paragraph D.5 (such shares to be hereinafter referred to as the "Unvested Shares").

2. **Exercise of the Repurchase Right.** The Repurchase Right shall be exercisable by written notice delivered to each Owner of the Unvested Shares prior to the expiration of the sixty (60)-day exercise period. The notice shall indicate the number of Unvested Shares to be repurchased and the date on which the repurchase is to be effected, such date to be not more than thirty (30) days after the date of such notice. The certificates representing the Unvested Shares to be repurchased shall be delivered to the Corporation on or before the close of business on the date specified for the repurchase. Concurrently with the receipt of such stock certificates, the Corporation shall pay to Owner, in cash or cash equivalents (including the cancellation of any purchase-money indebtedness), an amount equal to the Purchase Price previously paid for the Unvested Shares which are to be repurchased from Owner.

3. **Termination of the Repurchase Right.** The Repurchase Right shall terminate with respect to any Unvested Shares for which it is not timely exercised under Paragraph D.2. In addition, the Repurchase Right shall terminate and cease to be exercisable with respect to any and all Purchased Shares in which Participant vests in accordance with the following Vesting Schedule:

Participant shall vest in twenty-five percent (25%) of the Purchased Shares, and the Repurchase Right shall concurrently lapse with respect to those Purchased Shares, upon Participant's completion of one (1) year of Service measured from \_\_\_\_\_, 200\_\_\_\_\_.

Participant shall vest in the remaining seventy-five percent (75%) of the Purchased Shares, and the Repurchase Right shall concurrently lapse with respect to those Purchased Shares, in a series of thirty-six (36) successive equal monthly installments upon Participant's completion of each additional month of Service over the thirty-six (36) month period measured from the date on which the first twenty-five percent (25%) of the Purchased Shares vests hereunder.

All Purchased Shares as to which the Repurchase Right lapses shall, however, remain subject to (i) the First Refusal Right and (ii) the Market Stand-Off.

4. **Recapitalization.** Any new, substituted or additional securities or other property (including cash paid other than as a regular cash dividend) which is by reason of any Recapitalization distributed with respect to the Purchased Shares shall be immediately subject to the Repurchase Right and any escrow requirements hereunder, but only to the extent the Purchased Shares are at the time covered by such right or escrow requirements. Appropriate adjustments to reflect such distribution shall be made to the number and/or class of Purchased Shares subject to this Agreement and to the price per share to be paid upon the exercise of the Repurchase Right in order to reflect the effect of any such Recapitalization upon the Corporation's capital structure; *provided*, however, that the aggregate purchase price shall remain the same.

5. **Corporate Transaction.**

(a) The Repurchase Right shall automatically terminate in its entirety, and all the Purchased Shares shall vest in full, immediately prior to the consummation of any Corporate Transaction, except to the extent the Repurchase Right is to be assigned to the successor entity in such Corporate Transaction.

(b) To the extent the Repurchase Right remains in effect following a Corporate Transaction, such right shall apply to any new securities or other property (including any cash payments) received in exchange for the Purchased Shares in consummation of the Corporate Transaction, but only to the extent the Purchased Shares are at the time covered by such right. Appropriate adjustments shall be made to the price per share payable upon exercise of the Repurchase Right to reflect the effect of the Corporate Transaction upon the Corporation's capital structure; *provided*, however, that the aggregate purchase price shall remain the same. The new securities or other property (including any cash payments) issued or distributed with respect to the Purchased Shares in consummation of the Corporate Transaction shall be immediately deposited in escrow with the Corporation (or the successor entity) and shall not be released from escrow until Participant vests in such securities or other property in accordance with the same Vesting Schedule in effect for the Purchased Shares.

(c) The Repurchase Right may also terminate on an accelerated basis, and the Purchased Shares shall immediately vest in full, in accordance with the terms and conditions of any special addendum attached to this Agreement.

E. **RIGHT OF FIRST REFUSAL**

1. **Grant.** The Corporation is hereby granted the right of first refusal (the "First Refusal Right"), exercisable in connection with any proposed transfer of the Purchased Shares in which Participant has vested in accordance with the provisions of Article D. For purposes of this Article E, the term "transfer" shall include any sale, assignment, pledge, encumbrance or other disposition of the Purchased Shares intended to be made by Owner, but shall not include any Permitted Transfer.

2. **Notice of Intended Disposition.** In the event any Owner of Purchased Shares in which Participant has vested desires to accept a bona fide third-party offer for the transfer of any or all of such shares (the Purchased Shares subject to such offer to be hereinafter referred to as the "Target Shares"), Owner shall promptly (i) deliver to the Corporation written notice (the "Disposition Notice") of the terms of the offer, including the purchase price and the identity of the third-party offeror, and (ii) provide satisfactory proof that the disposition of the Target Shares to such third-party offeror would not be in contravention of the provisions set forth in Articles B and C.

3. **Exercise of the First Refusal Right.** The Corporation shall, for a period of twenty-five (25) days following receipt of the Disposition Notice, have the right to repurchase any or all of the Target Shares subject to the Disposition Notice upon the same terms as those specified therein or upon such other terms (not materially different from those specified in the Disposition Notice) to which Owner consents. Such right shall be exercisable by delivery of written notice (the "Exercise Notice") to Owner prior to the expiration of the twenty-five (25)-day exercise period. If such right is exercised with respect to all the Target Shares, then the Corporation shall effect the repurchase of such shares, including payment of the purchase price, not more than five (5) business days after delivery of the Exercise Notice; and at such time the certificates representing the Target Shares shall be delivered to the Corporation.

Should the purchase price specified in the Disposition Notice be payable in property other than cash or evidences of indebtedness, the Corporation shall have the right to pay the purchase

price in the form of cash equal in amount to the value of such property. If Owner and the Corporation cannot agree on such cash value within ten (10) days after the Corporation's receipt of the Disposition Notice, the valuation shall be made by an appraiser of recognized standing selected by Owner and the Corporation or, if they cannot agree on an appraiser within twenty (20) days after the Corporation's receipt of the Disposition Notice, each shall select an appraiser of recognized standing and the two (2) appraisers shall designate a third appraiser of recognized standing, whose appraisal shall be determinative of such value. The cost of such appraisal shall be shared equally by Owner and the Corporation. The closing shall then be held on the *later* of (i) the fifth (5th) business day following delivery of the Exercise Notice or (ii) the fifth (5th) business day after such valuation shall have been made.

4. **Non-Exercise of the First Refusal Right.** In the event the Exercise Notice is not given to Owner prior to the expiration of the twenty-five (25)-day exercise period, Owner shall have a period of thirty (30) days thereafter in which to sell or otherwise dispose of the Target Shares to the third-party offeror identified in the Disposition Notice upon terms (including the purchase price) no more favorable to such third-party offeror than those specified in the Disposition Notice; *provided*, however, that any such sale or disposition must not be effected in contravention of the provisions of Articles B and C. The third-party offeror shall acquire the Target Shares free and clear of the First Refusal Right, but the acquired shares shall remain subject to the provisions of Article B and Paragraph C.3. In the event Owner does not effect such sale or disposition of the Target Shares within the specified thirty (30)-day period, the First Refusal Right shall continue to be applicable to any subsequent disposition of the Target Shares by Owner until such right lapses.

5. **Partial Exercise of the First Refusal Right.** In the event the Corporation makes a timely exercise of the First Refusal Right with respect to a portion, but not all, of the Target Shares specified in the Disposition Notice, Owner shall have the option, exercisable by written notice to the Corporation delivered within five (5) business days after Owner's receipt of the Exercise Notice, to effect the sale of the Target Shares pursuant to either of the following alternatives:

(i) sale or other disposition of all the Target Shares to the third-party offeror identified in the Disposition Notice, but in full compliance with the requirements of Paragraph E.A, as if the Corporation did not exercise the first Refusal Right; or

(ii) sale to the Corporation of the portion of the Target Shares which the Corporation has elected to purchase, such sale to be effected in substantial conformity with the provisions of Paragraph E.3. The First Refusal Right shall continue to be applicable to any subsequent disposition of the remaining Target Shares until such right lapses.

Owner's failure to deliver timely notification to the Corporation shall be deemed to be an election by Owner to sell the Target Shares pursuant to alternative (i) above.

6. **Recapitalization/Reorganization.**

(a) Any new, substituted or additional securities or other property which is by reason of any Recapitalization distributed with respect to the Purchased Shares shall be immediately subject to the First Refusal Right, but only to the extent the Purchased Shares are at the time covered by such right.

(b) In the event of a Reorganization, the First Refusal Right shall remain in full force and effect and shall apply to the new capital stock or other property received in exchange for the Purchased Shares in consummation of the Reorganization, but only to the extent the Purchased Shares are at the time covered by such right.

7. **Lapse.** The First Refusal Right shall lapse upon the *earliest* to occur of (i) the first date on which shares of the Common Stock are held of record by more than five hundred

(500) persons, (ii) a determination made by the Board that a public market exists for the outstanding shares of Common Stock or (iii) a firm commitment underwritten public offering, pursuant to an effective registration statement under the 1933 Act, covering the offer and sale of the Common Stock in the aggregate amount of at least ten million dollars (\$10,000,000). However, the Market Stand-Off shall continue to remain in full force and effect following the lapse of the First Refusal Right.

#### F. **SPECIAL TAX ELECTION**

1. **Section 83(b) Election.** Under Code Section 83, the excess of the Fair Market Value of the Purchased Shares on the date any forfeiture restrictions applicable to such shares lapse over the Purchase Price paid for such shares will be reportable as ordinary income on the lapse date. For this purpose, the term "forfeiture restrictions" includes the right of the Corporation to repurchase the Purchased Shares pursuant to the Repurchase Right. Participant may elect under Code Section 83(b) to be taxed at the time the Purchased Shares are acquired, rather than when and as such Purchased Shares cease to be subject to such forfeiture restrictions. Such election must be filed with the Internal Revenue Service within thirty (30) days after the date of this Agreement. Even if the Fair Market Value of the Purchased Shares on the date of this Agreement equals the Purchase Price paid (and thus no tax is payable), the election must be made to avoid adverse tax consequences in the future. **THE FORM FOR MAKING THIS ELECTION IS ATTACHED AS EXHIBIT II HERETO. PARTICIPANT UNDERSTANDS THAT FAILURE TO MAKE THIS FILING WITHIN THE APPLICABLE THIRTY (30)-DAY PERIOD WILL RESULT IN THE RECOGNITION OF ORDINARY INCOME AS THE FORFEITURE RESTRICTIONS LAPSE.**

2. **FILING RESPONSIBILITY. PARTICIPANT ACKNOWLEDGES THAT IT IS PARTICIPANT'S SOLE RESPONSIBILITY, AND NOT THE CORPORATION'S, TO FILE A TIMELY ELECTION UNDER CODE SECTION 83(b), EVEN IF PARTICIPANT REQUESTS THE CORPORATION OR ITS REPRESENTATIVES TO MAKE THIS FILING ON HIS OR HER BEHALF.**

#### G. **GENERAL PROVISIONS**

1. **Assignment.** The Corporation may assign the Repurchase Right and/or the First Refusal Right to any person or entity selected by the Board, including (without limitation) one or more stockholders of the Corporation.

2. **No Employment or Service Contract.** Nothing in this Agreement or in the Plan shall confer upon Participant any right to continue in Service for any period of specific duration or interfere with or otherwise restrict in any way the rights of the Corporation (or any Parent or Subsidiary employing or retaining Participant) or of Participant, which rights are hereby expressly reserved by each, to terminate Participant's Service at any time for any reason, with or without cause.

3. **Notices.** Any notice required to be given under this Agreement shall be in writing and shall be deemed effective upon personal delivery or upon deposit in the U.S. mail, registered or certified, postage prepaid and properly addressed to the party entitled to such notice at the address indicated below such party's signature line on this Agreement or at such other address as such party may designate by ten (10) days advance written notice under this paragraph to all other parties to this Agreement.

4. **No Waiver.** The failure of the Corporation in any instance to exercise the Repurchase Right or the First Refusal Right shall not constitute a waiver of any other repurchase rights and/or rights of first refusal that may subsequently arise under the provisions of this Agreement or any other agreement between the Corporation and Participant. No waiver of any breach or condition of this Agreement shall be deemed to be a waiver of any other or subsequent breach or condition, whether of like or different nature.

5. **Cancellation of Shares.** If the Corporation shall make available, at the time and place and in the amount and form provided in this Agreement, the consideration for the Purchased Shares to be repurchased in accordance with the provisions of this Agreement, then from and after such time, the person from whom such shares are to be repurchased shall no longer have any rights as a holder of such shares (other than the right to receive payment of such consideration in accordance with this Agreement). Such shares shall be deemed purchased in accordance with the applicable provisions hereof, and the Corporation shall be deemed the owner and holder of such shares, whether or not the certificates therefor have been delivered as required by this Agreement.

#### H. MISCELLANEOUS PROVISIONS

1. **Governing Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of [ ] without resort to that State's conflict-of-laws rules.

2. **Participant Undertaking.** Participant hereby agrees to take whatever additional action and execute whatever additional documents the Corporation may deem necessary or advisable in order to carry out or effect one or more of the obligations or restrictions imposed on either Participant or the Purchased Shares pursuant to the provisions of this Agreement.

3. **Agreement is Entire Contract.** This Agreement constitutes the entire contract between the parties hereto with regard to the subject matter hereof. This Agreement is made pursuant to the provisions of the Plan and shall in all respects be construed in conformity with the terms of the Plan.

4. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

5. **Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of, and be binding upon, the Corporation and its successors and assigns and upon Participant, Participant's assigns and the legal representatives, heirs and legatees of Participant's estate, whether or not any such person shall have become a party to this Agreement and have agreed in writing to join herein and be bound by the terms hereof.

6. **Tax Implications.** Participant understands that the fair value of the shares received pursuant to this Agreement, as determined by the Corporation's board of directors, will be reportable as ordinary income and be subject to withholding on the same basis as compensation paid in cash. PARTICIPANT ACKNOWLEDGES THAT THE CORPORATION HAS NOT PROVIDED TAX OR OTHER ADVICE WITH REGARD TO ANY TAX ISSUES, AND THAT PARTICIPANT IS NOT RELYING ON THE CORPORATION FOR ANY SUCH ADVICE IN CONNECTION WITH THE PURCHASE OF THE PURCHASED SHARES.

**IN WITNESS WHEREOF**, the parties have executed this Agreement on the day and year first indicated above.

**NUVASIVE, INC.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
**PARTICIPANT**

Address: \_\_\_\_\_  
\_\_\_\_\_

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**SPOUSAL ACKNOWLEDGMENT**

The undersigned spouse of Participant has read and hereby approves the foregoing Stock Issuance Agreement. In consideration of the Corporation's granting Participant the right to acquire the Purchased Shares in accordance with the terms of such Agreement, the undersigned hereby agrees to be irrevocably bound by all the terms of such Agreement, including (without limitation) the right of the Corporation (or its assigns) to purchase any Purchased Shares in which Participant is not vested at the time of his or her cessation of Service.

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**PARTICIPANT'S SPOUSE**

Address:

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**EXHIBIT I**

**ASSIGNMENT SEPARATE FROM CERTIFICATE**

FOR VALUE RECEIVED \_\_\_\_\_ hereby sell(s), assign(s) and transfer(s) unto NuVasive, Inc. (the "Corporation"),  
( \_\_\_\_\_ ) shares of the Common Stock of the Corporation standing in his or her name on the books of the Corporation represented by  
Certificate No. \_\_\_\_\_ herewith and do(es) hereby irrevocably constitute and appoint \_\_\_\_\_ Attorney to transfer the said stock on  
the books of the Corporation with full power of substitution in the premises.

Dated:

Signature \_\_\_\_\_

**Instruction:** Please do not fill in any blanks other than the signature line. Please sign exactly as you would like your name to appear on the issued stock certificate. The purpose of this assignment is to enable the Corporation to exercise the Repurchase Right without requiring additional signatures on the part of Participant.

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**EXHIBIT II**  
**SECTION 83(b) TAX ELECTION**

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**SECTION 83(b) TAX ELECTION**

This statement is being made under Section 83(b) of the Internal Revenue Code, pursuant to Treas. Reg. Section 1.83-2.

- (1) The taxpayer who performed the services is:  
Name:  
Address:  
Taxpayer Ident. No.:
- (2) The property with respect to which the election is being made is \_\_\_\_\_ shares of the common stock of NuVasive, Inc.
- (3) The property was issued on \_\_\_\_\_, 200 .
- (4) The taxable year in which the election is being made is the calendar year 200 .
- (5) The property is subject to a repurchase right pursuant to which the issuer has the right to acquire the property at the original purchase price if for any reason taxpayer's service with the issuer terminates. The issuer's repurchase right lapses in a series of annual and monthly installments over a four (4)-year period ending on \_\_\_\_\_, 200 .
- (6) The fair market value at the time of transfer (determined without regard to any restriction other than a restriction which by its terms will never lapse) is \$ \_\_\_\_\_ per share.
- (7) The amount paid for such property is \$ \_\_\_\_\_ per share.
- (8) A copy of this statement was furnished to NuVasive, Inc. for whom taxpayer rendered the services underlying the transfer of property.
- (9) This statement is executed on \_\_\_\_\_, 200 .

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Spouse (if any) \_\_\_\_\_ Taxpayer \_\_\_\_\_

*This election must be filed with the Internal Revenue Service Center with which taxpayer files his or her Federal income tax returns and must be made within thirty (30) days after the execution date of the Stock Issuance Agreement. This filing should be made by registered or certified mail, return receipt requested. Participant must retain two (2) copies of the completed form for filing with his or her Federal and state tax returns for the current tax year and an additional copy for his or her records.*

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**EXHIBIT III**

**1998 STOCK OPTION/STOCK ISSUANCE PLAN**

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## APPENDIX

The following definitions shall be in effect under the Agreement:

- A. **Agreement** shall mean this Stock Issuance Agreement.
- B. **Board** shall mean the Corporation's Board of Directors.
- C. **Code** shall mean the Internal Revenue Code of 1986, as amended.
- D. **Common Stock** shall mean the Corporation's common stock.
- E. **Corporate Transaction** shall mean either of the following stockholder-approved transactions:
  - (i) a merger or consolidation in which securities possessing more than fifty percent (50%) of the total combined voting power of the Corporation's outstanding securities are transferred to a person or persons different from the persons holding those securities immediately prior to such transaction, or
  - (ii) the sale, transfer or other disposition of all or substantially all of the Corporation's assets in complete liquidation or dissolution of the Corporation.
- F. **Corporation** shall mean NuVasive, Inc., a Delaware corporation.
- G. **Disposition Notice** shall have the meaning assigned to such term in Paragraph E.2.
- H. **Exercise Notice** shall have the meaning assigned to such term in Paragraph E.3.
- I. **Fair Market Value** of a share of Common Stock on any relevant date, prior to the initial public offering of the Common Stock, shall be determined by the Plan Administrator after taking into account such factors as it shall deem appropriate.
- J. **First Refusal Right** shall mean the right granted to the Corporation in accordance with Article E.
- K. **Market Stand-Off** shall mean the market stand-off restriction specified in Paragraph C.3.
- L. **1933 Act** shall mean the Securities Act of 1933, as amended.
- M. **Owner** shall mean Participant and all subsequent holders of the Purchased Shares who derive their chain of ownership through a Permitted Transfer from Participant.
- N. **Parent** shall mean any corporation (other than the Corporation) in an unbroken chain of corporations ending with the Corporation, provided each corporation in the unbroken chain (other than the Corporation) owns, at the time of the determination, stock possessing fifty percent (50%) or more of the total combined voting power of all classes of stock in one of the other corporations in such chain.
- O. **Participant** shall mean the person to whom shares are issued under the Stock Issuance Program.
- P. **Permitted Transfer** shall mean (i) a gratuitous transfer of the Purchased Shares, *provided and only if* Participant obtains the Corporation's prior written consent to such transfer, (ii) a transfer of title to the Purchased Shares effected pursuant to Participant's will or the laws of intestate succession following Participant's death or (iii) a transfer to the Corporation in pledge as security for any purchase-money indebtedness incurred by Participant in connection with the acquisition of the Purchased Shares.
- Q. **Plan** shall mean the Corporation's 1998 Stock Option/Stock Issuance Plan attached hereto as Exhibit III.

- R. **Plan Administrator** shall mean either the Board or a committee of the Board acting in its capacity as administrator of the Plan.
- S. **Purchase Price** shall have the meaning assigned to such term in Paragraph A.1.
- T. **Purchased Shares** shall have the meaning assigned to such term in Paragraph A.1.
- U. **Recapitalization** shall mean any stock split, stock dividend, recapitalization, combination of shares, exchange of shares or other change affecting the Corporation's outstanding Common Stock as a class without the Corporation's receipt of consideration.
- V. **Reorganization** shall mean any of the following transactions:
- (i) a merger or consolidation in which the Corporation is not the surviving entity,
  - (ii) a sale, transfer or other disposition of all or substantially all of the Corporation's assets,
  - (iii) a reverse merger in which the Corporation is the surviving entity but in which the Corporation's outstanding voting securities are transferred in whole or in part to a person or persons different from the persons holding those securities immediately prior to the merger, or
  - (iv) any transaction effected primarily to change the state in which the Corporation is incorporated or to create a holding company structure.
- W. **Repurchase Right** shall mean the right granted to the Corporation in accordance with Article D.
- X. **SEC** shall mean the Securities and Exchange Commission.
- Y. **Service** shall mean the Participant's performance of services for the Corporation (or any Parent or Subsidiary) in the capacity of an employee, subject to the control and direction of the employer entity as to both the work to be performed and the manner and method of performance, a non-employee member of the board of directors or an independent consultant.
- Z. **Stock Issuance Program** shall mean the Stock Issuance Program under the Plan.
- AA. **Subsidiary** shall mean any corporation (other than the Corporation) in an unbroken chain of corporations beginning with the Corporation, provided each corporation (other than the last corporation) in the unbroken chain owns, at the time of the determination, stock possessing fifty percent (50%) or more of the total combined voting power of all classes of stock in one of the other corporations in such chain.
- AB. **Target Shares** shall have the meaning assigned to such term in Paragraph E.2.
- AC. **Vesting Schedule** shall mean the vesting schedule specified in Paragraph D.3 pursuant to which Participant is to vest in the Purchased Shares in a series of installments over the Participant's period of Service.
- AD. **Unvested Shares** shall have the meaning assigned to such term in Paragraph D.1.

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[NUVASIVE, INC. STOCK ISSUANCE AGREEMENT](#)

**NUVASIVE, INC.  
STOCK ISSUANCE AGREEMENT**

**AGREEMENT** made as of this    day of                   , 2004, by and between NuVasive, Inc., a Delaware corporation, and Participant in the Corporation's 1998 Stock Option/Stock Issuance Plan.

All capitalized terms in this Agreement shall have the meaning assigned to them in this Agreement or in the attached Appendix.

**A. PURCHASE OF SHARES**

1. **Purchase.** Participant hereby purchases                    shares of Common Stock (the "Purchased Shares") pursuant to the provisions of the Stock Issuance Program for services previously rendered valued at \$4.30 per share (the "Purchase Price").
2. **Payment.** Concurrently with the delivery of this Agreement to the Corporation, Participant shall be deemed to have provided to the Corporation the Purchase Price for the Purchased Shares in the form of past services rendered to the Corporation.
3. **Stockholder Rights.** Until such time as the Corporation exercises the First Refusal Right, Participant (or any successor in interest) shall have all stockholder rights (including voting, dividend and liquidation rights) with respect to the Purchased Shares, subject, however, to the transfer restrictions of Articles B and C.

**B. SECURITIES LAW COMPLIANCE**

1. **Restricted Securities.** The Purchased Shares have not been registered under the 1933 Act and are being issued to Participant in reliance upon the exemption from such registration provided by SEC Rule 701 for stock issuances under compensatory benefit plans such as the Plan. Participant hereby confirms that Participant has been informed that the Purchased Shares are restricted securities under the 1933 Act and may not be resold or transferred unless the Purchased Shares are first registered under the Federal securities laws or unless an exemption from such registration is available. Accordingly, Participant hereby acknowledges that Participant is prepared to hold the Purchased Shares for an indefinite period and that Participant is aware that SEC Rule 144 issued under the 1933 Act which exempts certain resales of unrestricted securities is not presently available to exempt the resale of the Purchased Shares from the registration requirements of the 1933 Act.
2. **Disposition of Purchased Shares.** Participant shall make no disposition of the Purchased Shares (other than a Permitted Transfer) unless and until there is compliance with all of the following requirements:
  - (i) Participant shall have provided the Corporation with a written summary of the terms and conditions of the proposed disposition.
  - (ii) Participant shall have complied with all requirements of this Agreement applicable to the disposition of the Purchased Shares.
  - (iii) Participant shall have provided the Corporation with written assurances, in form and substance satisfactory to the Corporation, that (a) the proposed disposition does not require registration of the Purchased Shares under the 1933 Act or (b) all appropriate action necessary for compliance with the registration requirements of the 1933 Act or any exemption from registration available under the 1933 Act (including Rule 144) has been taken.

The Corporation shall *not* be required (i) to transfer on its books any Purchased Shares which have been sold or transferred in violation of the provisions of this Agreement *or* (ii) to treat as the owner of the Purchased Shares, or otherwise to accord voting, dividend or liquidation rights to, any

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transferee to whom the Purchased Shares have been transferred in contravention of this Agreement.

3. **Restrictive Legends.** The stock certificates for the Purchased Shares shall be endorsed with one or more of the following restrictive legends:

"The shares represented by this certificate have not been registered under the Securities Act of 1933. The shares may not be sold or offered for sale in the absence of (a) an effective registration statement for the shares under such Act, (b) a "no action" letter of the Securities and Exchange Commission with respect to such sale or offer or (c) satisfactory assurances to the Corporation that registration under such Act is not required with respect to such sale or offer."

"The shares represented by this certificate are subject to certain rights of first refusal granted to the Corporation and accordingly may not be sold, assigned, transferred, encumbered, or in any manner disposed of except in conformity with the terms of a written agreement dated \_\_\_\_\_, 2004 between the Corporation and the registered holder of the shares (or the predecessor in interest to the shares). A copy of such agreement is maintained at the Corporation's principal corporate offices."

#### C. **TRANSFER RESTRICTIONS**

1. **Restriction on Transfer.** Purchased Shares shall not be transferred, assigned, encumbered or otherwise disposed of in contravention of the First Refusal Right or the Market Stand-Off.

2. **Transferee Obligations.** Each person (other than the Corporation) to whom the Purchased Shares are transferred by means of a Permitted Transfer must, as a condition precedent to the validity of such transfer, acknowledge in writing to the Corporation that such person is bound by the provisions of this Agreement and that the transferred shares are subject to (i) the First Refusal Right and (ii) the Market Stand-Off, to the same extent such shares would be so subject if retained by Participant.

3. **Market Stand-Off.**

(a) In connection with any underwritten public offering by the Corporation of its equity securities pursuant to an effective registration statement filed under the 1933 Act, including the Corporation's initial public offering, Owner shall not sell, make any short sale of, loan, hypothecate, pledge, grant any option for the purchase of, or otherwise dispose or transfer for value or otherwise agree to engage in any of the foregoing transactions with respect to, any Purchased Shares without the prior written consent of the Corporation or its underwriters. Such restriction (the "Market Stand-Off") shall be in effect for such period of time from and after the effective date of the final prospectus for the offering as may be requested by the Corporation or such underwriters. In no event, however, shall such period exceed one hundred eighty (180) days and the Market Stand-Off shall in all events terminate two (2) years after the effective date of the Corporation's initial public offering.

(b) Owner shall be subject to the Market Stand-Off *provided and only if* the officers and directors of the Corporation are also subject to similar restrictions.

(c) Any new, substituted or additional securities which are by reason of any Recapitalization or Reorganization distributed with respect to the Purchased Shares shall be immediately subject to the Market Stand-Off, to the same extent the Purchased Shares are at such time covered by such provisions.

(d) In order to enforce the Market Stand-Off, the Corporation may impose stop-transfer instructions with respect to the Purchased Shares until the end of the applicable stand-off period.

#### D. **RIGHT OF FIRST REFUSAL**

1. **Grant.** The Corporation is hereby granted the right of first refusal (the "First Refusal Right"), exercisable in connection with any proposed transfer of the Purchased Shares. For purposes of this Article D, the term "transfer" shall include any sale, assignment, pledge, encumbrance or other disposition of the Purchased Shares intended to be made by Owner, but shall not include any Permitted Transfer.

2. **Notice of Intended Disposition.** In the event any Owner of Purchased Shares in which Participant has vested desires to accept a bona fide third-party offer for the transfer of any or all of such shares (the Purchased Shares subject to such offer to be hereinafter referred to as the "Target Shares"), Owner shall promptly (i) deliver to the Corporation written notice (the "Disposition Notice") of the terms of the offer, including the purchase price and the identity of the third-party offeror, and (ii) provide satisfactory proof that the disposition of the Target Shares to such third-party offeror would not be in contravention of the provisions set forth in Articles B and C.

3. **Exercise of the First Refusal Right.** The Corporation shall, for a period of twenty-five (25) days following receipt of the Disposition Notice, have the right to repurchase any or all of the Target Shares subject to the Disposition Notice upon the same terms as those specified therein or upon such other terms (not materially different from those specified in the Disposition Notice) to which Owner consents. Such right shall be exercisable by delivery of written notice (the "Exercise Notice") to Owner prior to the expiration of the twenty-five (25)-day exercise period. If such right is exercised with respect to all the Target Shares, then the Corporation shall effect the repurchase of such shares, including payment of the purchase price, not more than five (5) business days after delivery of the Exercise Notice; and at such time the certificates representing the Target Shares shall be delivered to the Corporation.

Should the purchase price specified in the Disposition Notice be payable in property other than cash or evidences of indebtedness, the Corporation shall have the right to pay the purchase price in the form of cash equal in amount to the value of such property. If Owner and the Corporation cannot agree on such cash value within ten (10) days after the Corporation's receipt of the Disposition Notice, the valuation shall be made by an appraiser of recognized standing selected by Owner and the Corporation or, if they cannot agree on an appraiser within twenty (20) days after the Corporation's receipt of the Disposition Notice, each shall select an appraiser of recognized standing and the two (2) appraisers shall designate a third appraiser of recognized standing, whose appraisal shall be determinative of such value. The cost of such appraisal shall be shared equally by Owner and the Corporation. The closing shall then be held on the *later* of (i) the fifth (5th) business day following delivery of the Exercise Notice or (ii) the fifth (5th) business day after such valuation shall have been made.

4. **Non-Exercise of the First Refusal Right.** In the event the Exercise Notice is not given to Owner prior to the expiration of the twenty-five (25)-day exercise period, Owner shall have a period of thirty (30) days thereafter in which to sell or otherwise dispose of the Target Shares to the third-party offeror identified in the Disposition Notice upon terms (including the purchase price) no more favorable to such third-party offeror than those specified in the Disposition Notice; *provided*, however, that any such sale or disposition must not be effected in contravention of the provisions of Articles B and C. The third-party offeror shall acquire the Target Shares subject to the First Refusal Right and the provisions and restrictions of Article B and Paragraph C.3, and any subsequent disposition of the acquired shares must be effected in compliance with the terms and

conditions of such First Refusal Right and the provisions of Article B and Paragraph C.3. In the event Owner does not effect such sale or disposition of the Target Shares within the specified thirty (30)-day period, the First Refusal Right shall continue to be applicable to any subsequent disposition of the Target Shares by Owner until such right lapses.

5. **Partial Exercise of the First Refusal Right.** In the event the Corporation makes a timely exercise of the First Refusal Right with respect to a portion, but not all, of the Target Shares specified in the Disposition Notice, Owner shall have the option, exercisable by written notice to the Corporation delivered within five (5) business days after Owner's receipt of the Exercise Notice, to effect the sale of the Target Shares pursuant to either of the following alternatives:

(i) sale or other disposition of all the Target Shares to the third-party offeror identified in the Disposition Notice, but in full compliance with the requirements of Paragraph D.4, as if the Corporation did not exercise the First Refusal Right; or

(ii) sale to the Corporation of the portion of the Target Shares which the Corporation has elected to purchase, such sale to be effected in substantial conformity with the provisions of Paragraph D.3. The First Refusal Right shall continue to be applicable to any subsequent disposition of the remaining Target Shares until such right lapses.

Owner's failure to deliver timely notification to the Corporation shall be deemed to be an election by Owner to sell the Target Shares pursuant to alternative (i) above.

6. **Recapitalization/Reorganization.**

(a) Any new, substituted or additional securities or other property which is by reason of any Recapitalization distributed with respect to the Purchased Shares shall be immediately subject to the First Refusal Right, but only to the extent the Purchased Shares are at the time covered by such right.

(b) In the event of a Reorganization, the First Refusal Right shall remain in full force and effect and shall apply to the new capital stock or other property received in exchange for the Purchased Shares in consummation of the Reorganization, but only to the extent the Purchased Shares are at the time covered by such right.

7. **Lapse.** The First Refusal Right shall lapse upon the *earliest* to occur of (i) the first date on which shares of the Common Stock are held of record by more than five hundred (500) persons, (ii) a determination made by the Board that a public market exists for the outstanding shares of Common Stock or (iii) a firm commitment underwritten public offering, pursuant to an effective registration statement under the 1933 Act, covering the offer and sale of the Common Stock in the aggregate amount of at least ten million dollars (\$10,000,000). However, the Market Stand-Off shall continue to remain in full force and effect following the lapse of the First Refusal Right.

E. **GENERAL PROVISIONS**

1. **Assignment.** The Corporation may assign the First Refusal Right to any person or entity selected by the Board, including (without limitation) one or more stockholders of the Corporation.

2. **No Employment or Service Contract.** Nothing in this Agreement or in the Plan shall confer upon Participant any right to continue in Service for any period of specific duration or interfere with or otherwise restrict in any way the rights of the Corporation (or any Parent or Subsidiary employing or retaining Participant) or of Participant, which rights are hereby expressly reserved by each, to terminate Participant's Service at any time for any reason, with or without cause.

3. **Notices.** Any notice required to be given under this Agreement shall be in writing and shall be deemed effective upon personal delivery or upon deposit in the U.S. mail, registered or

certified, postage prepaid and properly addressed to the party entitled to such notice at the address indicated below such party's signature line on this Agreement or at such other address as such party may designate by ten (10) days advance written notice under this paragraph to all other parties to this Agreement.

4. **No Waiver.** The failure of the Corporation in any instance to exercise the First Refusal Right shall not constitute a waiver of any other rights of first refusal that may subsequently arise under the provisions of this Agreement or any other agreement between the Corporation and Participant. No waiver of any breach or condition of this Agreement shall be deemed to be a waiver of any other or subsequent breach or condition, whether of like or different nature.

5. **Cancellation of Shares.** If the Corporation shall make available, at the time and place and in the amount and form provided in this Agreement, the consideration for the Purchased Shares to be repurchased in accordance with the provisions of this Agreement, then from and after such time, the person from whom such shares are to be repurchased shall no longer have any rights as a holder of such shares (other than the right to receive payment of such consideration in accordance with this Agreement). Such shares shall be deemed purchased in accordance with the applicable provisions hereof, and the Corporation shall be deemed the owner and holder of such shares, whether or not the certificates therefor have been delivered as required by this Agreement.

#### F. MISCELLANEOUS PROVISIONS

1. **Governing Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of California without resort to that State's conflict-of-laws rules.

2. **Participant Undertaking.** Participant hereby agrees to take whatever additional action and execute whatever additional documents the Corporation may deem necessary or advisable in order to carry out or effect one or more of the obligations or restrictions imposed on either Participant or the Purchased Shares pursuant to the provisions of this Agreement.

3. **Agreement is Entire Contract.** This Agreement constitutes the entire contract between the parties hereto with regard to the subject matter hereof. This Agreement is made pursuant to the provisions of the Plan and shall in all respects be construed in conformity with the terms of the Plan.

4. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

5. **Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of, and be binding upon, the Corporation and its successors and assigns and upon Participant, Participant's assigns and the legal representatives, heirs and legatees of Participant's estate, whether or not any such person shall have become a party to this Agreement and have agreed in writing to join herein and be bound by the terms hereof.

6. **Tax Implications.** Participant understands that the fair value of the shares received pursuant to this Agreement, as determined by the Corporation's board of directors, will be reportable as ordinary income and be subject to withholding on the same basis as compensation paid in cash. PARTICIPANT ACKNOWLEDGES THAT THE CORPORATION HAS NOT PROVIDED TAX OR OTHER ADVICE WITH REGARD TO ANY TAX ISSUES, AND THAT PARTICIPANT IS NOT RELYING ON THE CORPORATION FOR ANY SUCH ADVICE IN CONNECTION WITH THE PURCHASE OF THE PURCHASED SHARES.

**IN WITNESS WHEREOF**, the parties have executed this Agreement on the day and year first indicated above.

**NUVASIVE, INC.**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Address: 10065 Old Grove Road  
San Diego, CA 92131

\_\_\_\_\_  
[PARTICIPANT]

Address: \_\_\_\_\_

\_\_\_\_\_

**SPOUSAL ACKNOWLEDGMENT**

The undersigned spouse of Participant has read and hereby approves the foregoing Stock Issuance Agreement. In consideration of the Corporation's granting Participant the right to acquire the Purchased Shares in accordance with the terms of such Agreement, the undersigned hereby agrees to be irrevocably bound by all the terms of such Agreement.

**PARTICIPANT'S SPOUSE**

Address:

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**EXHIBIT I**

**1998 STOCK OPTION/STOCK ISSUANCE PLAN**

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## APPENDIX

The following definitions shall be in effect under the Agreement:

- A. **Agreement** shall mean this Stock Issuance Agreement.
- B. **Board** shall mean the Corporation's Board of Directors.
- C. **Code** shall mean the Internal Revenue Code of 1986, as amended.
- D. **Common Stock** shall mean the Corporation's common stock.
- E. **Corporate Transaction** shall mean either of the following stockholder-approved transactions:
  - (i) a merger or consolidation in which securities possessing more than fifty percent (50%) of the total combined voting power of the Corporation's outstanding securities are transferred to a person or persons different from the persons holding those securities immediately prior to such transaction, or
  - (ii) the sale, transfer or other disposition of all or substantially all of the Corporation's assets in complete liquidation or dissolution of the Corporation.
- F. **Corporation** shall mean NuVasive, Inc., a Delaware corporation.
- G. **Disposition Notice** shall have the meaning assigned to such term in Paragraph D.2.
- H. **Exercise Notice** shall have the meaning assigned to such term in Paragraph D.3.
- I. **Fair Market Value** of a share of Common Stock on any relevant date, prior to the initial public offering of the Common Stock, shall be determined by the Plan Administrator after taking into account such factors as it shall deem appropriate.
- J. **First Refusal Right** shall mean the right granted to the Corporation in accordance with Article D.
- K. **Market Stand-Off** shall mean the market stand-off restriction specified in Paragraph C.3.
- L. **1933 Act** shall mean the Securities Act of 1933, as amended.
- M. **Owner** shall mean Participant and all subsequent holders of the Purchased Shares who derive their chain of ownership through a Permitted Transfer from Participant.
- N. **Parent** shall mean any corporation (other than the Corporation) in an unbroken chain of corporations ending with the Corporation, provided each corporation in the unbroken chain (other than the Corporation) owns, at the time of the determination, stock possessing fifty percent (50%) or more of the total combined voting power of all classes of stock in one of the other corporations in such chain.
- O. **Participant** shall mean the person to whom shares are issued under the Stock Issuance Program.
- P. **Permitted Transfer** shall mean (i) a gratuitous transfer of the Purchased Shares, *provided and only if* Participant obtains the Corporation's prior written consent to such transfer, (ii) a transfer of title to the Purchased Shares effected pursuant to Participant's will or the laws of intestate succession following Participant's death or (iii) a transfer to the Corporation in pledge as security for any purchase-money indebtedness incurred by Participant in connection with the acquisition of the Purchased Shares.
- Q. **Plan** shall mean the Corporation's 1998 Stock Option/Stock Issuance Plan attached hereto as Exhibit III.

- R. **Plan Administrator** shall mean either the Board or a committee of the Board acting in its capacity as administrator of the Plan.
- S. **Purchase Price** shall have the meaning assigned to such term in Paragraph A.1.
- T. **Purchased Shares** shall have the meaning assigned to such term in Paragraph A.1.
- U. **Recapitalization** shall mean any stock split, stock dividend, recapitalization, combination of shares, exchange of shares or other change affecting the Corporation's outstanding Common Stock as a class without the Corporation's receipt of consideration.
- V. **Reorganization** shall mean any of the following transactions:
- (i) a merger or consolidation in which the Corporation is not the surviving entity,
  - (ii) a sale, transfer or other disposition of all or substantially all of the Corporation's assets,
  - (iii) a reverse merger in which the Corporation is the surviving entity but in which the Corporation's outstanding voting securities are transferred in whole or in part to a person or persons different from the persons holding those securities immediately prior to the merger, or
  - (iv) any transaction effected primarily to change the state in which the Corporation is incorporated or to create a holding company structure.
- W. **SEC** shall mean the Securities and Exchange Commission.
- X. **Service** shall mean the Participant's performance of services for the Corporation (or any Parent or Subsidiary) in the capacity of an employee, subject to the control and direction of the employer entity as to both the work to be performed and the manner and method of performance, a non-employee member of the board of directors or an independent consultant.
- Y. **Stock Issuance Program** shall mean the Stock Issuance Program under the Plan.
- Z. **Subsidiary** shall mean any corporation (other than the Corporation) in an unbroken chain of corporations beginning with the Corporation, provided each corporation (other than the last corporation) in the unbroken chain owns, at the time of the determination, stock possessing fifty percent (50%) or more of the total combined voting power of all classes of stock in one of the other corporations in such chain.
- AA. **Target Shares** shall have the meaning assigned to such term in Paragraph D.2.

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