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17

18 **UNITED STATES DISTRICT COURT**

19 **SOUTHERN DISTRICT OF CALIFORNIA - SAN DIEGO DIVISION**

20 NUVASIVE, INC., a Delaware  
corporation,

21 Plaintiff,

22 v.

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

26 Defendants.  
27

**Case No. 3:18-CV-00347-CAB-MDD**

[Assigned to Courtroom 4C – Honorable  
Cathy Ann Bencivengo]

**DEFENDANTS’ REPLY IN SUPPORT  
OF MOTION TO EXCLUDE THE  
EXPERT TESTIMONY OF JIM  
YOUSSEF, BLAKE INGLISH, AND  
STEPHEN G. KUNIN**

PER CHAMBERS RULES, NO ORAL  
ARGUMENT UNLESS SEPARATELY  
ORDERED BY THE COURT

**TABLE OF CONTENTS**

**Page**

I. INTRODUCTION ..... 1

II. REPORT AND TESTIMONY OF DR. YOUSSEF ..... 1

    A. Dr. Youssef’s Opinion on Secondary Considerations is  
    Inadmissible. .... 1

    B. Dr. Youssef’s Opinion and Testimony on Damages ..... 4

III. REPORT AND TESTIMONY OF MR. ENGLISH ..... 5

IV. REPORT AND TESTIMONY OF MR. KUNIN..... 5

V. CONCLUSION ..... 7

1  
2  
3  
4  
5  
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1 **I. INTRODUCTION**

2 The opinions of Dr. Youssef, Mr. English, and Mr. Kunin should be excluded.

3 **II. REPORT AND TESTIMONY OF DR. YOUSSEF**

4 **A. Dr. Youssef's Opinion on Secondary Considerations is Inadmissible.**

5 **1. Dr. Youssef's Nexus Testimony is Inadmissible.**

6 NuVasive contends that Alphatec is wrong on the law, but does not explain how  
7 or why Alphatec is incorrect. (Doc. No. 259 at 7–8.) NuVasive's main complaint is  
8 that Alphatec cited cases addressing "the merits as to whether nexus was established,"  
9 suggesting that experts failing to establish nexus as a matter of law cannot be excluded  
10 at the *Daubert* stage. (Doc. No. 259 at 8.) Of course that is not true. *Daubert v. Merrell*  
11 *Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993); *see also Cot'n Wash, Inc. v.*  
12 *Henkel Corp.*, 56 F. Supp.3d 626, 650–651 (D. Del. 2014), *aff'd* 606 Fed. App'x 1009  
13 (Fed. Cir. 2015) (excluding expert opinions of commercial success and industry praise  
14 for lack of nexus); *DataTreasury Corp. v. Wells Fargo & Co.*, No. 2:06–CV–72 DF,  
15 2010 WL 3912264, at \*4 (E.D. Tex. Sept. 13, 2010) (likewise excluding expert opinion  
16 when there was no support "for a nexus between industry success . . . on one hand and  
17 the merits of the claimed inventions on the other.").

18 NuVasive also contends that Alphatec is wrong on the facts. (Doc. No. 259 at 8–  
19 9.) Dr. Youssef presumes nexus based on his opinion that the asserted claims are co-  
20 extensive with XLIF. (*Id.*) However, it is undisputed that XLIF also requires spinal  
21 implants and a dedicated neuromonitoring platform, both of which ***are not embodied***  
22 ***and not claimed by the asserted patents.*** *NuVasive, Inc. v. Iancu*, 752 F. App'x 985,  
23 995 (Fed. Cir. 2018) ("And the Guide specifically identifies the MaXcess® II Access  
24 System, MaXcess® XLIF System, and Neurovision® System as part of the required  
25 instruments to successfully complete the technique."); (Doc. Nos. 259 at 9; 259-2 at ¶  
26 91.) Indeed, none of the alleged infringing combinations of Alphatec's accused  
27  
28

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