

# EXHIBIT 5

TO THE DECLARATION OF  
BRIAN J. NISBET IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

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6 *Attorneys of record continued on next page*

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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA – SAN DIEGO DIVISION**

NUVASIVE, INC., a Delaware corporation

Plaintiff,

v.

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

Defendants.

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

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

[Magistrate: Hon. Mitchell D. Dembin]

**HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY**

**SUBJECT TO PROTECTIVE ORDER**

**REBUTTAL REPORT OF BARTON L. SACHS, M.D., M.B.A., F.A.C.P.E., F.A.C.H.E.**

Complaint Filed: February 13, 2018  
Jury Trial Demanded



REBUTTAL EXPERT REPORT OF BARTON L. SACHS, M.D., M.B.A.,  
F A C P E F A C H E

1 doctrine of equivalents analysis. Dr. Youssef’s conclusory analysis simply erases  
 2 meaningful structural limitations from the claims. I understand that in any case, that is  
 3 not a proper doctrine of equivalents analysis and Dr. Youssef has failed to meaningfully  
 4 set forth any such analysis here.

5 255. For the reasons discussed above, the Battalion™ Lateral Spacer does not  
 6 infringe claim 1 of the ’334 patent.

7 **(a) Dependent Claims 16 and 18**

8 256. Claims 16 and 18 depend from independent claim 1. Alphatec’s  
 9 Battalion™ Lateral Spacer does not infringe these claims at least for the same reasons  
 10 as described above with respect to independent claim 1.

11 **(b) Dependent Claim 18**

12 257. Claim 18 additionally requires that the “maximum lateral width of said  
 13 implant is approximately 18 mm.” It is my opinion that certain configurations of the  
 14 Battalion™ Lateral Spacers do not meet this limitation, literally or under the doctrine of  
 15 equivalents.

16 258. The following configurations of the Alphatec’s Battalion™ Lateral  
 17 Spacers do not have a “maximum lateral width ... [of] ... approximately 18 mm.”

18	16 mm width, 30 mm length, 6 mm height (parallel and lordotic)
19	22 mm width, 45 mm length, 8 mm height (parallel and lordotic)
20	22 mm width, 45 mm length, 10 mm height (parallel and lordotic)
21	22 mm width, 45 mm length, 12 mm height (parallel and lordotic)
22	22 mm width, 50 mm length, 8 mm height (parallel and lordotic)
23	22 mm width, 50 mm length, 10 mm height (parallel and lordotic)
24	22 mm width, 50 mm length, 12 mm height (parallel and lordotic)
25	22 mm width, 50 mm length, 14 mm height (parallel and lordotic)
26	22 mm width, 55 mm length, 8 mm height (parallel and lordotic)
27	22 mm width, 55 mm length, 10 mm height (parallel and lordotic)

1 22 mm width, 55 mm length, 12 mm height (parallel and lordotic)

2 22 mm width, 60 mm length, 8 mm height (parallel and lordotic)

3 22 mm width, 60 mm length, 10 mm height (parallel and lordotic)

4 22 mm width, 60 mm length, 12 mm height (parallel and lordotic)

5  
6 259. Dr. Youssef states—without any explanation—that “Alphatec offers a  
7 version of the Battalion™ Lateral Spacer that is 22 mm wide, *which is approximately*  
8 *18 mm.*” (Youssef Rpt. at Ex. D at 69 (emphasis added).) The 22 mm wide Battalion™  
9 Lateral Implant, which is 22% wider than the 18 mm Battalion™ Lateral Spacer, does  
10 not have a maximum lateral width of “approximately 18 mm.” In fact, Dr. Youssef’s  
11 opinion that the 22 mm wide Battalion™ Lateral Spacer falls within the scope of this  
12 claim only confirms that this claim lacks reasonable certainty and renders the claim  
13 indefinite.

14 260. In fact, Dr. Youssef offers no written description or intrinsic evidence to  
15 support that the claims cover the above-listed configurations of the Alphatec’s  
16 Battalion™ Lateral Spacers. Specifically, the ’334 patent only discloses implants  
17 “having a width ranging between 9 and 18 mm, a height ranging between 8 and 16 mm,  
18 and a length ranging between 25 and 45 mm.” (’334 patent at 2:17–21.) Per this  
19 disclosure, the above-listed configurations of the Battalion™ Lateral Spacers having a  
20 22 mm width, 6 mm height, 50 mm length, 55 mm length, and 60 mm length are  
21 categorically excluded from the claim scope. Dr. Youssef’s opinion that these implants  
22 are covered by the claimed dimensions appears to be based on a subjective assessment  
23 and there is no objective criteria by which a POSA would conclude that these implants  
24 would fall within the scope of this claim.

25 261. Further, Dr. Youssef states in a conclusory fashion and without the  
26 required analysis or explanation that this limitation is also infringed under the doctrine  
27 of equivalents. (Youssef Rpt. at Ex. D at 74.) Dr. Youssef’s generalized statement  
28 alleging infringement under the doctrine of equivalents is unsupported, and lacks

1 particularized testimony and argument regarding the insubstantiality of any differences  
2 between the claimed invention and the accused implants that I understand is required in  
3 a proper doctrine of equivalents analysis. Dr. Youssef's conclusory analysis simply  
4 erases meaningful structural limitations from the claims. I understand that in any case,  
5 that is not a proper doctrine of equivalents analysis and Dr. Youssef has failed to  
6 meaningfully set forth any such analysis here.

7 262. Accordingly, these configurations of the Battalion™ Lateral Spacer do not  
8 infringe claim 18 of the '334 patent.

9 **2. Transcend™ LIF PEEK Spacer**

10 263. In my opinion, Alphatec's Transcend™ LIF PEEK Spacer does not  
11 infringe claims 16 and 18 of the '334 patent for the reasons set forth below.

12 **(a) Independent Claim 1**

13 264. Below I have reproduced independent claim 1 of the '334 patent. I  
14 understand that NuVasive is not asserting this claim, but asserted claims 16 and 18  
15 depend from independent claim 1.

16 1. A spinal fusion implant of non-bone construction positionable  
17 within an interbody space between a first vertebra and a second  
18 vertebra, said implant comprising:

19 an upper surface including anti-migration elements to contact  
20 said first vertebra when said implant is positioned within the  
21 interbody space, a lower surface including anti-migration  
22 elements to contact said second vertebra when said implant is  
23 positioned within the interbody space, a distal wall, a proximal  
24 wall, a first sidewall and a second sidewall, said distal wall,  
proximal wall, first sidewall, and second sidewall comprising a  
radiolucent material;

25 wherein said implant has a longitudinal length greater than 40  
26 mm extending from a proximal end of said proximal wall to a  
27 distal end of said distal wall;

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