

EXHIBIT 6

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

HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY

**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. 18-cv-00347-MDD-CAB

**CORRECTED OPENING EXPERT REPORT OF JIM YOUSSEF, MD REGARDING
U.S. PATENT NOS. 8,361,156 ('156 PATENT) AND 8,187,334 ('334 PATENT)**

**Exhibit
0001
Youssef**

HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY

At the request of counsel for NuVasive, Inc. (“NuVasive”), I hereby provide the following opinions. I reserve the right to amend and/or supplement this expert report based on my continuing review of the currently available evidence and/or if I am provided with additional evidence of relevance to the opinions set forth herein.

I. ASSERTED PATENTS AND CLAIMS

1. I am informed by counsel for NuVasive that NuVasive alleges that Alphatec Holdings, Inc. and Alphatec Spine, Inc. (“Alphatec”) have infringed certain claims of the U.S. Patent Nos. 8,361,156 (“the ’156 patent”) and 8,187,334 (“the ’334 patent”) (collectively, “the Implant Patents”).

2. I also am informed by counsel for NuVasive that NuVasive alleges that Alphatec has infringed the following claims of the Implant Patents (“Asserted Claims”):

Patent	Asserted Claims
'156 patent	1, 5, 10, 18, and 24
'334 patent	16 and 18

II. EDUCATION AND EXPERIENCE

3. I am an orthopaedic surgeon, board certified by the American Board of Orthopaedic Surgery, and fellowship trained in spine surgery.

4. I received an undergraduate degree in Genetics from the University of California at Berkeley in 1986. I received my medical degree from the University of California, Irvine School of Medicine, in 1991.

5. I completed an internship in general surgery at Oregon Health Sciences University in 1992. I performed my orthopaedic surgery residency at Dartmouth-Hitchcock Medical Center in Lebanon, New Hampshire from 1992-1996. I was chief resident of

HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY

D. Claim 18

- i.* [18]—**The spinal fusion implant of claim 1, wherein said maximum lateral width of said implant is approximately 18 mm.**

264. I am informed by counsel that the Court has not construed any other terms from this portion of the claim. Therefore, I have interpreted the claim language in accordance with its plain and ordinary meaning.

a. Practice by the NuVasive Embodying Products

265. As discussed above, the '334 Embodying Implants meet every limitation of claim 1 of the '334 patent. In addition, NuVasive's relevant surgical guides and/or other marketing, design, and education materials teach that the 18 mm wide versions of the '334 Embodying Implants have maximum lateral width that is approximately 18 mm. *See Appendix B*, Element [18].

266. Thus, the '334 Embodying Implants practice this limitation of claim 18.

b. Infringement by the Accused Alphatec Products

267. As discussed above, Alphatec's Accused Implants meet every limitation of claim 1 of the '334 patent. In addition, as promoted and described in Alphatec's surgical guides and/or other marketing, design, and education materials, and as further confirmed by the testimony of Alphatec's witnesses, at least the 18 mm wide versions of the Battalion™ Lateral Spacer and the Transcend™ LIF PEEK further have a maximum lateral width of approximately 18 mm. *See Exhibits D and E*, Element [18]; *see also* Section XI, *infra*.

268. In addition, Alphatec has made the Titec Coated LLIF Implants which, as shown in Alphatec's development materials and as further confirmed by the testimony of Alphatec's witnesses, are essentially identical in relevant part to the Battalion™ Lateral Spacer and the Transcend™ LIF PEEK Spacer (further including an additional titanium coating on the surface

HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY

of the PEEK implant). *See* Section XI, *infra*. Thus, for the same reasons as at least the 18 mm wide versions of the Battalion™ Lateral Spacer and the Transcend™ LIF PEEK Spacer, the corresponding versions of the Titec Coated LLIF implants have a maximum lateral width of approximately 18 mm. *See Exhibit F*, Element [18]; *see also* Section XI, *infra*.

269. Thus, Alphatec's Accused Implants meet this limitation of claim 18.

XIV. THERE ARE NO ACCEPTABLE NON-INFRINGEMENT ALTERNATIVES

270. As detailed in my analysis below, there are no acceptable non-infringing alternatives to NuVasive's MAS Platform/XLIF Procedure using the CoRoent XL line of implants as of the time of Alphatec's infringement because no other non-infringing surgical platform offers the key benefits and advantages of the patented surgical platform.

271. In particular, in my experience, surgeons specifically choose to utilize XLIF (and relatedly Alphatec's Accused Products) because, as described in paragraphs 87-104 of my Opening Report, paragraphs 1-2, 16-30 of my November 8, 2019 Damages Report, and paragraphs 432-446 below, the patented features present within these products collectively function in such a way that allows surgeons to achieve a safe and reproducible, minimally invasive, and clinically successful interbody fusion.

272. I addressed ALIF, PLIF, and TLIF fusion surgeries in paragraphs 65-70; 1278 of my Opening Report. Furthermore, I explained how XLIF solved the problems associated with these types of surgeries in paragraphs 87-102 of my Opening Report. As set forth in 1278 of my opening report, ALIF, PLIF, and TLIF fusion surgeries would not be acceptable non-infringing alternatives because they are inferior to the patented products in key respects. For similar reasons, implants designed for such procedures would not be acceptable non-infringing alternatives to NuVasive's XLIF Procedure/MAS platform using CoRoent XL implants.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.