

# EXHIBIT 7

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

HIGHLY CONFIDENTIAL-ATTORNEY'S 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

REBUTTAL EXPERT REPORT OF JIM YOUSSEF, MD

Exhibit  
0002  
Youssef

**HIGHLY CONFIDENTIAL-ATTORNEY'S EYES ONLY**

does not cite any information that supports his opinions regarding what he believes is reflected in these documents.

182. Also, February 2004 is less than one year before March 29, 2004 so this sales spreadsheet does not indicate a sale more than one year prior to the priority date.

***xii. May 21, 2004 Email***

183. Dr. Sachs cites to a May 21, 2004 email (NUVA\_ATEC0341150) and an attachment (NUVA\_ATEC0341153) and concludes they show a prior sale. Sachs Implant Opening Report at ¶ 314. I disagree.

184. As stated above (¶ 89), these documents do not provide a description of the relevant features of the referenced devices, nor do they contain any description of the circumstances surrounding what Dr. Sachs opines was their use or sale. Moreover, Dr. Sachs does not cite any information that supports his opinions regarding what he believes is reflected in these documents.

185. Also, February 2004 and March 2004 are less than one year before March 29, 2004 so the May 21, 2004 email (NUVA\_ATEC0341150) and accompanying attachment (NUVA\_ATEC0341153) do not indicate a sale more than one year prior to the priority date.

**XII. THE ASSERTED CLAIMS ARE NOT INDEFINITE**

**A. Claims 1 and 16 of the '334 Patent are not Indefinite—"central region" and "generally parallel"**

186. Dr. Sachs contends that claims 1 and 16 of the '334 patent are indefinite because the claim language "central region" would not inform a POSA of the scope of the claims. Sachs Implant Opening Report at ¶ 329. I disagree. For the reasons set forth below, a POSA reading the claim language "central region" in the context of the claims and the specification would understand the scope of the claims.

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187. Dr. Sachs also contends that claim 1 is indefinite because claim 1 requires a longitudinal aperture length extending “generally parallel” to the longitudinal length of the implant. Sachs Implant Opening Report at ¶ 329. I disagree. For the reasons set forth below, a POSA reading the claim language “generally parallel” in the context of the claims and the specification would understand the scope of the claims.<sup>6</sup>

188. Specifically, Dr. Sachs states “the claims, specification, and file history fail to provide guidance regarding how to determine the size, shape, or bounds of the claimed ‘central region,’ or how to determine whether the first and second sidewalls, medial support, and/or radiopaque markers are positioned ‘generally centrally’ or within the ‘central region.’ Moreover, the specification of the ’334 patent fails to provide any guidance regarding how to determine whether a longitudinal aperture length extends ‘generally parallel’ to the longitudinal length of the implant.” Sachs Implant Opening Report at ¶ 329.

189. I note that Alphatec identified the central region of Figure 2 of the ’334 patent during *inter partes* review and made the below, annotated, diagram:

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<sup>6</sup> I understand from counsel that Alphatec did not include any indefiniteness arguments in its Final Invalidity Contentions regarding “generally parallel,” and thus Dr. Sachs’s opinions are improper. Regardless, I address them in this report.

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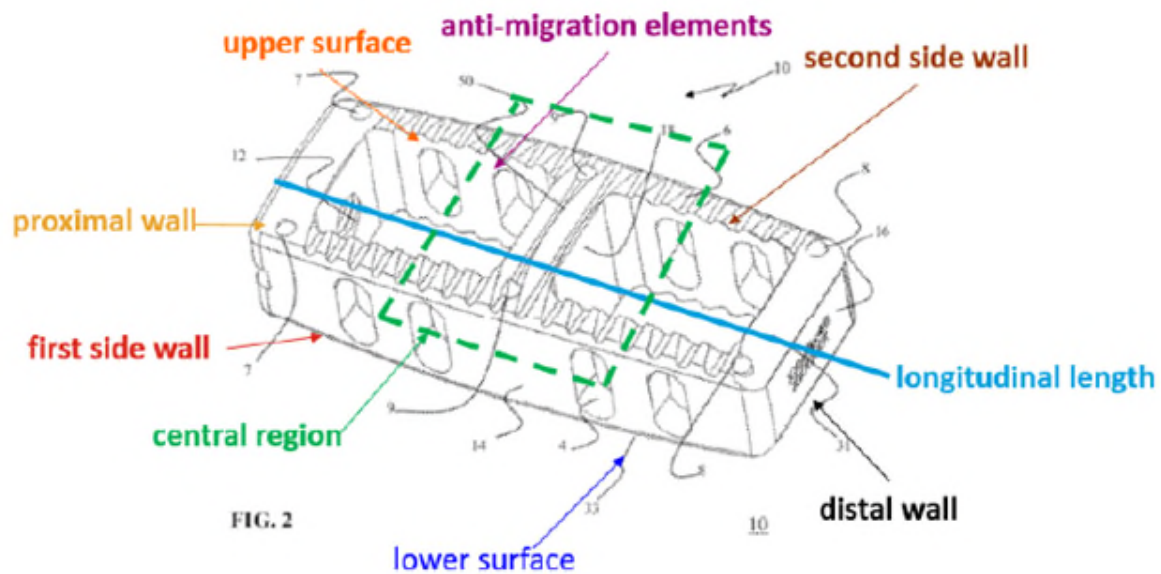


FIG. 2

IPR2019-00546, Pet. at 7.

190. I am also informed by counsel that the Patent Trial and Appeal Board did not note any ambiguity in the scope of the claim limitation “central region” during *inter partes* review.

191. Dr. Sachs notes that the specification of the '334 patent does not contain a definition of “central region,” implying that one is necessary. Sachs Implant Opening Report at ¶ 329. I disagree. A person of skill in the art can readily understand the meaning of “central region” as recited in the claims of the '334 patent in the context of the specification and prosecution history.

192. Dr. Sachs further states “the claims, specification, and file history fail to provide guidance regarding how to determine the size, shape, or bounds of the claimed ‘central region,’ or how to determine whether the first and second sidewalls, medial support, and/or radiopaque markers are positioned ‘generally centrally’ or within the ‘central region.’” Sachs Implant Opening Report at ¶ 329. Again, I disagree. As exemplified by Alphatec’s annotation of Figure 2 of the '334 patent, a person of skill in the art can readily determine the central region of the

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