

EXHIBIT 4

TO THE DECLARATION OF BRIAN J.
NISBET IN SUPPORT OF DEFENDANTS'
OPPOSITION TO NUVASIVE'S MOTION
FOR PARTIAL SUMMARY JUDGMENT
AND MOTION TO EXCLUDE

Paper No. _____
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALPHATEC HOLDINGS, INC. and ALPHATEC SPINE, INC.
Petitioners,

v.

NUVASIVE, INC.,
Patent Owner.

Case No. IPR2019-00361
Patent No. 8,187,334

**PATENT OWNER PRELIMINARY RESPONSE
PURSUANT TO 37 C.F.R. § 42.107**

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modular members are assembled modularly in the disc space, the combined width of the assembled modular implant would once again be 36 mm or larger, not approximately 18 mm as required by the claim. Petitioners' Ground 2 arguments thus conflate the dimensions of the claimed implant with the dimensions of a modular member designed to be "combined" in a modular fashion with other modular members. The '334 patent does not claim an 18-mm wide modular member for combination in a modular fashion, but instead claims a complete implant having a maximum lateral width of approximately 18 mm. For the reasons discussed above, Petitioners fail to establish a reasonable expectation of success for Ground 2.

VI. PETITIONERS' GROUND 2 CHALLENGE FAILS BECAUSE IT IS BASED ON A MISREADING OF BACCELLI

A. Petitioners' Ground 2 challenge fails because Baccelli does not disclose the claimed radiopaque marker configuration.

Petitioners' argument misinterprets spikes of the Baccelli implant as markers.

Contrary to Petitioners' assertions, and as shown by adding corrections in purple outlines to Petitioners' graphic below (Pet. 16, 45), Baccelli discloses an implant having two (not four) radiopaque markers, each marker being disposed in a duct along the distal or proximal wall—not in the middle of the sidewalls. Ex. 1008, [0050].

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