

EXHIBIT 7
TO TRENT TANNER DECLARATION ISO
NUVASIVE'S COMBINED MOTIONS IN LIMINE

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17

18 **UNITED STATES DISTRICT COURT**
19 **SOUTHERN DISTRICT OF CALIFORNIA**
20 **SAN DIEGO DIVISION**

22 NUVASIVE, INC., a Delaware
corporation,
23 Plaintiff,
24
25 v.
26 ALPHATEC HOLDINGS, INC., a
Delaware corporation and
27 ALPHATEC SPINE, INC., a
California corporation,
28 Defendants.

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

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

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

Complaint Filed: February 13, 2018
Jury Trial Demanded

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1 **I. INTRODUCTION**

2 1. I am a practicing spine surgeon, specializing in minimally invasive
3 surgery, spinal arthroplasty and spine deformities, spine reconstruction, and deformity
4 surgery. A complete statement of my rate, qualifications and my CV were included
5 with my previously prepared Rebuttal Report of Barton L. Sachs, M.D., M.B.A.,
6 F.A.C.P.E., F.A.C.H.E. submitted on November 22, 2019.

7 2. Defendants Alphatec Holdings, Inc. and Alphatec Spine (collectively,
8 “Alphatec”) retained me as an expert to analyze certain aspects of U.S. Patent Nos.
9 8,439,832 (the “’832 patent”); 9,833,227 (the “’227 patent”); 8,355,780 (the “’780
10 patent”); 9,974,531 (the “’531 patent”); 9,924,859 (the “’859 patent”); 8,753,270 (the
11 “’270 patent”); 7,819,801 (the “’801 patent”) (collectively, the “patents-in-suit”). In
12 forming my opinions as set forth in this report, I have relied upon my education,
13 research, training, and decades of experience in the area of spinal surgery and spinal
14 fusion surgery, and documents considered and contained herein.

15 3. During the preliminary injunction phase of this case, I provided an opinion
16 regarding invalidity and non-infringement of some of the patents-in-suit. I expressly
17 incorporate herein by reference my earlier opinion and accompanying exhibits. (Doc.
18 No. 49-5.)

19 4. I also previously prepared and submitted the Rebuttal Report of Barton L.
20 Sachs, M.D., M.B.A., F.A.C.P.E., F.A.C.H.E., another expert report in this case (my
21 “Rebuttal Report”). My Rebuttal Report was in response to Dr. Jim Youssef’s Opening
22 Expert Report. My Rebuttal Report provided background regarding spinal surgery
23 procedures, the state of the art, and an overview of the products at issue here, as well as
24 offered my analysis and opinions on whether Alphatec infringes any asserted claim in
25 this case, whether Alphatec copied NuVasive, noninfringing alternatives, and the harm
26 to the public should Alphatec’s product be enjoined. I expressly incorporate by
27 reference the entirety of my Rebuttal Report and accompanying exhibits.

28

1 products would not have found any of the available lateral products on the market to be
2 acceptable substitutes to NuVasive’s MAS Platform of products, ‘but for’ Alphatec’s
3 infringement.” (Youssef Damages Rpt. at ¶ 30.)

4 **V. NO EVIDENCE OF DEMAND FOR NUVASIVE’S PRODUCTS HAS**
5 **BEEN TIED TO THE PATENTED FEATURES**

6 50. Dr. Youssef has not shown that demand for NuVasive’s products coupled
7 in the “functional units” is tied to the patented features. In addition to demand not being
8 tied to the MaXcess retractor, there are several products included in these “functional
9 units” that are not covered by the asserted patents, including NuVasive’s
10 neuromonitoring system.

11 **VI. ANALYSIS OF TECHNOLOGY COVERED IN LICENSE**
12 **AGREEMENTS**

13 51. I have reviewed several patents that have been licensed in agreements
14 involving either Alphatec or NuVasive to determine whether any of them concern the
15 same technology as the patents-in-suit. (See Youssef Damages Rpt. at ¶¶ 7–15.)

16 52. **Alphatec-Warsaw Agreement:** Three patents, U.S. Patent Nos.
17 6,945,933 (the “’933 patent”), 7,625,379 (the “’379 patent”), and 8,486,083 (the “’083
18 patent”) (collectively, the “Warsaw Patents”), were licensed to Alphatec by Warsaw
19 Orthopedic, Inc.

20 53. The Warsaw Patents, which are generally directed toward access
21 instruments that can be used in a lateral procedure, are comparable to the technology
22 claimed in the patents-in-suit.

23 54. The ’933 patent is directed to “instruments and methods for performing
24 tissue retraction and surgeries through the retracted tissue in minimally invasive
25 procedures.” (’933 patent at 1:7–10.) The disclosed procedures can be performed
26 “through a working channel or passageway through skin and tissue of the patient
27 provided by a retractor.” (’933 patent at 2:36–38.) The ’933 patent discloses that the
28 retractor can be used with a lateral surgical approach. (’933 patent at 2:47–51.) The

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