

EXHIBIT 5

**TO THE DECLARATION OF BRIAN J. NISBET
IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY ADJUDICATION**



Consulting Agreement Memo

Date: October 26, 2017
To: Matt Link
CC: File
RE: SPS (Global) Consulting Agreement for Jim Youssef, M.D. (contracting as Durango Spine, LLLP)

Dr. Youssef (contracting as Durango Spine, LLLP) has submitted a new consulting agreement that covers his engagement for services relating to lateral spine surgery and/or single position spine surgery.

Services: Educational Lecturing Services for NuVasive Employees, Agents and Contractors
Preceptorships
Educational Lecturing Services for Health Care Professionals
Proctoring/Product Training Services
Product Evaluation Services
Product Development Services
Market Assessment Services
M&A, Joint Venture and Investment Services
Strategic Planning Services

Cash Compensation: \$1,250,000, paid quarterly over five years

Equity Compensation: Five grants of PRSUs occurring on January 2, 2018, 2019, 2020, 2021 and 2022, each for a target number of shares calculated by dividing \$600,000 by the closing price per share of NuVasive's common stock on the respective grant date.

Each PRSU award shall vest on the five-year anniversary of the applicable grant date. The number of shares of common stock payable upon vesting of each PRSU award shall be equal to 0-100% of the target number of shares for such award based on the level of achievement of Cumulative Global Revenue of products incorporating Consultant's developments.

Term: Ten years

CONSULTING AGREEMENT

This CONSULTING AGREEMENT (the "Agreement") is dated as of October 26, 2017 (the "Effective Date"), by and between NuVasive, Inc., a Delaware corporation ("NuVasive"), and Durango Spine, LLLP ("Consultant").

WHEREAS, NuVasive is a medical device company that develops, manufactures and supplies certain surgical products and procedurally-integrated solutions for the spine and, in connection therewith, consults with licensed medical professionals for assistance in a variety of areas in order to improve spine surgery and patient outcomes; and

WHEREAS, Consultant, through the personal services of Jim A. Youssef, M.D, a licensed physician and agent of Consultant ("HCP" and together with Consultant, jointly and severally, "Provider"), has the appropriate expertise and qualifications to consult with NuVasive regarding certain of its products and procedures; and

WHEREAS, NuVasive and Consultant are parties to that certain General Consulting and Services Agreement, dated April 1, 2009, as amended April 8, 2010, June 1, 2011 and August 30, 2017 (the "Prior Agreement"), and the parties desire that the Prior Agreement remain in full force and effect in accordance with its terms; and

WHEREAS, NuVasive and Consultant are parties to that certain Surgeon Advisory Board Consulting Agreement, dated as of February 8, 2017 (the "SAB Agreement"), and the parties now wish to terminate the SAB Agreement and further desire that this Agreement supersede and replace the SAB Agreement in its entirety; and

WHEREAS, NuVasive and Consultant wish to enter into this Agreement, to, among other things, establish a long-term exclusive consulting arrangement whereby Provider agrees to provide Consulting services related to the field of spine surgery only to NuVasive.

NOW, THEREFORE, the parties hereby agree as follows:

1. **TERM; SERVICES.**

(a) NuVasive hereby engages Provider, and Provider accepts such engagement, to provide Services (as defined below) to NuVasive for a period of ten years from and after the Effective Date hereof (as such period may be earlier terminated in accordance with the terms of this Agreement, the "Term"). During the Term, on average, Consultant agrees to perform no less than 20 hours of Services per month. It is expected that Provider, in performing the Services, will create Developments (as defined below) that will provide substantial and valuable long-term benefits to NuVasive.

(b) During the Term, Consultant shall provide the services (the "Services") set forth on the Scope(s) of Work (each, an "SOW") entered into under this Agreement from time to time by the parties. Consultant agrees that all Services under this Agreement shall be performed exclusively by HCP unless otherwise agreed in writing by NuVasive. Consultant covenants, acknowledges and agrees that it shall be responsible for (i) HCP's compliance with the terms and conditions applicable to HCP and Provider hereunder and (ii) all acts and omissions of HCP hereunder. In addition, HCP covenants, acknowledges and agrees that HCP is personally responsible for complying with the terms and conditions applicable to HCP and Provider hereunder.

(c) The initial SOWs are attached hereto as **EXHIBIT A-1** and **EXHIBIT A-2**, and, as additional Services may be requested of Consultant by NuVasive, such additional Services will be documented by additional SOWs to be acknowledged by NuVasive, Consultant and HCP. Each SOW shall be deemed a part of this Agreement and subject to the same terms and conditions set forth herein. For purposes of clarity, any reference to "Agreement" herein shall be interpreted to include this Agreement and any applicable SOW. In addition to describing the Services of a respective engagement by NuVasive of Consultant, each SOW may also contain certain terms and conditions applicable with respect to each such engagement.

(d) In performing the Services under this Agreement, Provider shall report and be responsible to Matthew Link and/or such other employee designated in the applicable SOW and/or such other person(s) as may be subsequently designated by NuVasive (the "NuVasive Designee(s)"). Provider shall be responsible for recording the number of hours associated with performing the Services hereunder and documenting the Developments. NuVasive shall facilitate these efforts and provide reasonable assistance and support in furtherance thereof.

(e) Provider shall provide all Services in a professional, skilled, and efficient manner, consistent with pertinent industry standards. Provider shall also use commercially reasonable efforts and such working time and energy as may be required for the satisfactory performance of the Services in accordance with NuVasive's requests and instructions.

2. CONSIDERATION.

(a) As compensation for the provision of all Services provided hereunder by Consultant, including the exclusivity of the consulting arrangement established pursuant to Section 5 hereof, as well as consideration for Consultant's assignment to NuVasive of all worldwide right, title and interest in and to all Developments pursuant to Section 8 hereof, NuVasive agrees to pay to Consultant certain quarterly cash payments (the "Cash Consideration") and to grant HCP annual equity-based awards in the form of performance restricted stock units ("PRsUs") (together with the Cash Consideration, the "Consideration"), as follows:

(i) Subject to Provider's continued provision of Services and compliance with the terms of this Agreement, within 45 days of the end of each calendar quarter, beginning with the calendar quarter ending March 30, 2018 through and including the calendar quarter ending March 30, 2023, NuVasive shall make a cash payment to Consultant equal to the amount of \$62,500.

(ii) Subject to Provider's continued provision of Services and compliance with the terms of this Agreement, on each of January 2, 2018, 2019, 2020, 2021 and 2022 (each such date, a "Grant Date"), NuVasive shall grant HCP a PRSU award, which shall, in each case, vest on the five-year anniversary of the respective Grant Date (each such date, a "Vesting Date").

(iii) Each PRSU award shall be granted with respect to a target number of shares of Company common stock (the "Target"), calculated by dividing \$600,000 by the closing price per share of the Company's common stock on the respective Grant Date. The number of shares of common stock payable upon vesting of each PRSU award shall be equal to 0%-100% of the Target for such award based on the level of achievement of Cumulative Global Revenue (as defined below) of Products (as defined below) incorporating the Developments. On an annual basis, the Company shall calculate the amount of Cumulative Global Revenue of Products as of the end of the fiscal quarter ending September 30 of such year (commencing with the fiscal quarter ending September 30, 2022) (each such date, a "Measurement Date"). If the Cumulative Global Revenue as of the applicable Measurement Date for a PRSU award meets or exceeds the Cumulative Global Revenue Target for such PRSU award as set forth in the table below, the number of shares of common stock payable upon vesting of such PRSU award shall be equal to 100% of the Target number of shares for such PRSU award. If the Cumulative Global Revenue as of the applicable Measurement Date for a PRSU award does not meet the Cumulative Global Revenue Target for such PRSU award as set forth in the table below, the number of shares of common stock payable upon vesting of such PRSU award shall be equal to (a) the Target number of shares for such PRSU award multiplied by (b) the percentage achievement of the Cumulative Global Revenue Target for such PRSU award, determined by linear interpolation and rounded to the nearest tenth of a percent; provided, however, that if the Cumulative Global Revenue Minimum as of the applicable Measurement Date for a PRSU award is not achieved, then no shares of common stock shall be payable upon vesting of such PRSU award.

Grant Date	Jan. 2, 2018	Jan. 2, 2019	Jan. 2, 2020	Jan. 2, 2021	Jan. 2, 2022
Measurement Date	Sept 30, 2022	Sept 30, 2023	Sept 30, 2024	Sept 30, 2025	Sept 30, 2026
Cumulative Global Revenue Target	\$100.0 million	\$200.0 million	\$300.0 million	\$400.0 million	\$500.0 million
Cumulative Global Revenue Minimum	\$10.0 million	\$20.0 million	\$30.0 million	\$40.0 million	\$50.0 million
Vesting Date	Jan. 2, 2023	Jan. 2, 2024	Jan. 2, 2025	Jan. 2, 2026	Jan. 2, 2027

(iv) As used herein, "Products" shall mean any NuVasive products related to lateral spine surgery and/or single position spine surgery for which Consultant provides strategic input and guidance and/or for which Consultant's Developments provide a novel, significant or innovative contribution to the development thereof pursuant to this Agreement and which were commercialized during the term of this Agreement, in each case, as determined by NuVasive in its sole discretion. The parties agree that NuVasive shall unilaterally create a list of such Products, to be attached as Schedule 1 to this Agreement, and that from time to time, such Schedule 1 may be updated unilaterally by NuVasive upon its determination (in its sole discretion) that it has commercialized a Product to which Consultant's Developments have provided a novel, significant and/or innovative contribution. NuVasive agrees that in creating such list and making determinations with respect thereto, NuVasive shall use an approach consistent with that used for other providers providing consulting services related to lateral spine surgery and/or single position spine surgery.

(v) As used herein, "Cumulative Global Revenue" as of a Measurement Date shall mean the revenue recognized by NuVasive under U.S. GAAP for all Products billed to hospitals or other professional end-users (excluding Products purchased by HCP, Consultant, HCP's practice group or hospital, or any other entity affiliated with HCP or Consultant) for commercial sale following full commercial launch of the Products (as determined by NuVasive in its sole discretion) and through and including the applicable Measurement Date, in the aggregate. It is understood and agreed between the parties that NuVasive shall have no obligation whatsoever to achieve, or use any efforts to achieve, any commercialization, development, or promotion of the Products nor any obligation to maximize the amount of Cumulative Global Revenue with respect thereto. NuVasive agrees to provide Provider with its calculation of Cumulative Global Revenue as of each Measurement Date no later than thirty (30) days after the expiration of the accounting and audit close of the NuVasive fiscal quarter ending on each Measurement Date (but in no event later than one hundred twenty (120) days after the last day of each such fiscal quarter), which shall include the determination as to the number of shares of common stock payable upon vesting of each PRSU award.

(vi) Each PRSU award will be subject to approval by the Compensation Committee of NuVasive's Board of Directors and evidenced by, and subject to the terms and condition of, a performance restricted stock unit agreement between HCP and NuVasive, substantially in the form attached hereto as Annex I (the "PRSU Agreement"). If any PRSU award is not granted to HCP because it was not approved by the Compensation Committee of NuVasive's Board of Directors, and if Provider has fulfilled its obligations pursuant to this Agreement and has not breached the terms and conditions of this Agreement, failure to grant such PRSU award shall be considered a termination by Provider for "good reason" (as set forth in the PRSU Agreement) and Provider shall be entitled to (A) vesting of any outstanding PRSU awards pursuant to the terms of Section 12 hereof and (B) liquidated damages pursuant to the terms of Section 14 hereof.

(vii) The parties acknowledge and agree that Consultant shall not be entitled to, nor receive, any royalties, milestones or other payments from NuVasive with respect to Developments and the Consideration represents fair market value for the Services to be provided during the Term of the Agreement, including the Developments to be created hereunder. The parties acknowledge and agree that the Consideration has not been determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between Provider and NuVasive, and shall not obligate Provider to purchase, utilize, recommend, or arrange for the use of any NuVasive products. Consultant agrees to document all Services Provider provides, which shall include the date the Services were provided, a detailed description of the Services provided (e.g., preparation time, research time, speaking time, etc.) and the amount of time spent providing the Services. Consultant shall provide NuVasive with copies of such documentation, in form and substance as may be reasonably requested by NuVasive, on a monthly basis or as may reasonably be requested by NuVasive.

(b) No part of the Consideration will be subject to payroll tax withholding and payment by NuVasive including, but not limited to, federal income tax, state income tax, federal and state employment taxes, federal social security tax, and federal Medicare tax. Consultant and HCP agree to complete and return to NuVasive a completed W-9 form and to report to the appropriate taxing authorities any and all Consideration received from NuVasive hereunder and shall be solely responsible for the payment of any and all taxes respective thereto. NuVasive will report the Consideration as required by applicable federal, state or local tax law or regulations. Upon receipt by NuVasive of copies of receipts or other appropriate evidence of expenditures by Consultant, NuVasive shall reimburse Consultant for pre-approved, reasonable travel expenses incurred by Consultant at the request of NuVasive in the course of rendering Services hereunder in accordance with NuVasive's travel and expense policies.

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