



organized and existing under the laws of the State of Ohio, with its principal place of business at 5692 West Mill Road, Broadview Heights, Ohio 44147.

### **JURISDICTION AND VENUE**

3. The Court has personal jurisdiction over Mati Medical because, upon information and belief, it is incorporated in the State of Ohio and transacts business in the State of Ohio.

4. The Court has subject matter jurisdiction over this action under 28 U.S.C. §§1331, 1338; Section 3 of the Lanham Act, 15 U.S.C. § 1121; 28 U.S.C. § 1332 (diversity); 28 U.S.C. § 1367 (supplemental jurisdiction). The amount in controversy exceeds \$75,000, exclusive of interest and costs. Venue is proper under 28 U.S.C. § 1391 (b) and (c).

### **FACTS COMMON TO ALL CLAIMS**

#### **Back Pain and Spinal Facet Fusion**

5. Back pain is one of the most common ailments in adults, affecting an estimated 50 million people in the U.S. An estimated 80% of adults will experience back pain at some point in their life, while 50% of the working population have back pain every year. The National Center for Health Statistics reports that 14% of new patient visits to physician offices, or approximately 13 million annually, are for complaints of lower back pain. In the next 12 months, there will be more episodes of back pain than any other disease except the common cold. Facet joint disorders (degenerative conditions such as osteoarthritis) are among the most common of all the recurrent disabling lower back problems that cause serious symptoms. Facet joints are also gaining increasing favor as primary and supplementary fusion sites. The American Academy of Orthopedic Surgeons

reports spinal fusion is the most commonly performed operation for back pain with approximately two million fusion procedures performed since 1990, and approximately 400,000 spinal fusions performed in 2007 in the U.S. alone.

**The TruFUSE<sup>®</sup> Products**

6. Plaintiffs' patent-pending TruFUSE<sup>®</sup> Product is a unique, novel spinal facet fusion system invented by Dr. David A. Petersen, M.D., FAAOS that offers a low-risk and minimally invasive surgical solution to back pain resulting from facet joint degeneration and from mild spinal instability. Among other things, the TruFUSE<sup>®</sup> Product significantly reduces a patient's time in the hospital, time off of work, recovery time, and rehabilitation time as compared to traditional spinal fusion surgeries. In most cases, the TruFUSE<sup>®</sup> surgery can be completed in less than an hour and requires no more than a one-night hospital stay. The TruFUSE<sup>®</sup> Product is sold through a network of over 40 distributors and is represented by some 300 sales representatives across the United States. As of January 15, 2008, over 2,500 TruFUSE<sup>®</sup> allograft sets have been sold in the United States, over 200 surgical instrument sets designed exclusively for use in implanting TruFUSE<sup>®</sup> allografts have been consigned to distributors, hospitals and surgeons. In addition, more than 100 surgeons have used TruFUSE<sup>®</sup> Products while more than 600 surgeons have been trained and certified in the technique and are awaiting hospital clearances. The overwhelming majority of patients treated with the TruFUSE<sup>®</sup> Products have reported a significant and lasting reduction in pain and a return to daily living routines with minimal recovery time.

7. TruFUSE<sup>®</sup> Products are packaged in three formats: (1) a single 5.0 mm dowel including two preformed Allografts and one drill bit per box; (2) a single spinal level 5.0 mm dowel including one preformed Allograft with one drill bit for every two boxes; and (3) a

single 7.5 mm dowel including one preformed Allograft. Other Instruments designed for use with the Allografts (e.g., drill guides, holders, inserters and tamps) are reusable. One complete set of 5.0 mm Instruments is provided to each TruFUSE<sup>®</sup> certified surgeon upon completion of training. In addition, each distributor receives one 7.5 mm Instrument set for every ten 7.5 mm dowel sets ordered. MinSURG also provides TruFUSE<sup>®</sup> Allografts and Instruments on consignment to both hospitals and distributors.

**The TRUFUSE<sup>®</sup> Trademark**

8. ODC is the owner of the TRUFUSE<sup>®</sup> mark, Registration No. 3,290,465, filed on November 16, 2005, for use in connection with "human allograft tissue" in International Class 5 (the "TRUFUSE<sup>®</sup> Mark"). The foregoing registration is current and valid. ODC has continuously offered and sold Allografts and associated Instruments under the TRUFUSE<sup>®</sup> Mark since at least January 1, 2006.

9. Plaintiffs have invested millions of dollars and have expended significant effort in developing and refining the product design, technique and surgical instruments in addition to advertising and promoting the TruFUSE<sup>®</sup> Products in conjunction with the TRUFUSE<sup>®</sup> Mark across the United States. Plaintiffs prominently display the TRUFUSE<sup>®</sup> Mark on all TruFUSE<sup>®</sup> Products, and clinical, training and marketing materials. As a result, TruFUSE<sup>®</sup> Products have become known and recognized by medical professionals throughout the United States as a symbol of unique, proprietary and effective surgical technique performed using high quality human allograft tissue products and surgical instruments.

**Nutech Medical Inc.'s Competing Facet Fusion Product**

10. On or about September 17, 2007, Plaintiffs received a report from one of its distributors that another one of its distributors, Nutech Medical, Inc. ("Nutech"), was developing and marketing a "TruFUSE<sup>®</sup> knock-off" facet fusion product. Upon further investigation, Plaintiffs learned that Nutech was planning to market a competitive facet fusion product under the confusingly similar name "NUFUZE" and that the product, upon information and belief, incorporates Plaintiffs' proprietary information and trade secrets provided to Nutech pursuant to its distribution agreement with Plaintiffs and is a copy of the TruFUSE<sup>®</sup> Products. Among other things, ODC received reports from one of its new hires, that prior to commencing his employment with ODC, Nutech had engaged him as a consultant to review designs for a new spinal facet fusion product Nutech intended to market. After reviewing the product, the surgeon came to the conclusion that Nutech's new product was "essentially the same as TruFUSE<sup>®</sup>."

11. Upon hearing that the Nutech facet fusion product was to be marketed under the "NUFUZE" mark, Plaintiffs conducted a United States Patent and Trademark Office (the "USPTO") database search and confirmed that Nutech had indeed registered the trademark NUFUZE, along with the trademark BIOFUZE, in the category of "[s]urgical implants compromising allograft or other processed human or animal tissue and associated surgical instrument sets" (the "Nutech Trademark Applications"). On December 5, 2007, ODC filed a Notice of Opposition to the Nutech Trademark Applications with the Trademark Trial and Appeal Board. On January 14, 2008, Nutech filed an answer to ODC's Opposition to the Nutech Trademark Applications abandoning its application for registration of the NUFUZE

and BIOFUZE marks.

12. Plaintiffs further learned that Kenneth Horton ("Horton"), Nutech's President and sole owner and an ODC shareholder, had incorporated NuFuze, Inc. as a corporate entity separate from Nutech in the State of Alabama on March 1, 2007 and that NuFuze, Inc.'s corporate name was changed to NuFix, Inc. on August 7, 2007. Horton is listed as the incorporator and sole shareholder of NuFix and the address of the corporation is the same as that of Nutech.

13. Beginning in or about December 2007, Plaintiffs learned that Nutech began marketing its competing allograft product to TruFUSE<sup>®</sup>-trained surgeons under the brand names "NuFuze" and/or "NuFix." On or about December 31, 2007, Plaintiffs received confirmation of a report from its Los Angeles based distributor that a surgeon that uses TruFUSE<sup>®</sup> in his practice reported being contacted by Nutech distributor offering "NUFUZE" at a "drastically reduced price."

14. On or about January 9, 2008, Plaintiffs received a report from its Michigan distributor that Silver Surgical Supply, one of Plaintiffs' former distributors, had commenced marketing and selling Nutech's facet fusion product under the brand name "NuFix" to surgeons and hospitals in Ohio and Michigan.

15. On January 22, 2008, ODC received a report from its Ohio distributor that, according to a surgeon that uses TruFUSE<sup>®</sup> Products in his practice, Mati Medical attempted to convince him to use NuFix instead of TruFUSE<sup>®</sup> Products on the same day as a planned surgery saying that "they use the same [surgical] instrumentation [as TruFUSE<sup>®</sup>] and that the

only difference is that the product has ridges.”

16. On February 7, 2008, ODC and MinSURG filed a complaint in the United States District Court, Middle District of Florida against Nutech, NuFix, Horton, and Todd Gilbert ("Gilbert"), another ODC shareholder involved in the creation of Nutech's/NuFix's facet fusion product ("Florida Complaint"). The Florida Complaint alleges, among other things, that the sale of Nutech's/NuFix's facet fusion product constitutes trademark infringement, unfair competition and false advertising under both the Lanham Act and state law, entitling Plaintiffs to both injunctive relief and damages. In addition, the Florida Complaint alleges misappropriation of trade secrets and breaches of contract against Nutech, Horton and Gilbert.

17. On the same day, Plaintiffs sent a letter to Mati Medical putting Mati Medical on formal notice of the claims asserted against Nutech, NuFix, Horton and Gilbert in connection with the sale of Nutech's/NuFix's facet fusion product, demanding that Mati Medical discontinue all infringing activities related to Nutech's/NuFix's facet fusion product and provide assurances to Plaintiffs that it had ceased all of its infringing activities within ten (10) days, by February 18, 2008. A true and correct copy of Plaintiffs' cease and desist letters are attached hereto as Exhibit "A".

18. Plaintiffs did not receive the requested assurances by February 18, 2008, and upon information and belief, Mati Medical continues to distribute Nutech's/NuFix's infringing facet fusion product.

19. Upon information and belief, Mati Medical is marketing Nutech's/NuFix's

facet fusion product to hospitals using Nutech/NuFix marketing, pitch and other presentation materials (the “Nutech Materials”). Upon information and belief, the Nutech Materials falsely claim, among other things, that (a) the TruFUSE<sup>®</sup> Allograft has a tendency to pop out after it is implanted and that the ridge design of NuFix reduces this occurrence; and that (b) NuFix is designed to be used with TruFUSE<sup>®</sup> Instruments held on consignment by hospitals.

20. By virtue of the foregoing acts, Mati Medical has, among other things, contributed to the creation of a strong likelihood of consumer confusion as to the source of origin or relationship of TruFUSE<sup>®</sup> and Nutech's/NuFix's facet fusion product and has otherwise contributed to Nutech's/NuFix's unfair competition with Plaintiffs, which has caused and will continue to cause irreparable injury to Plaintiffs' brand, business reputation and good will, the loss of business and other damages.

### **CAUSES OF ACTION**

#### **FIRST CAUSE OF ACTION**

(Lanham Act Unfair Competition -- False Designation of Origin)

(15 U.S.C. §1125(a)(1)(A))

21. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 20 of the Complaint as if fully set forth herein.

22. The foregoing conduct of Mati Medical constitutes direct and contributory unfair competition, false designation of origin, and false and misleading descriptions and/or representations of fact that are likely to cause confusion or mistake, or to deceive consumers as to the affiliation, connection, or association of Nutech's competing facet fusion product

with the TruFUSE<sup>®</sup> Products or as to the origin, sponsorship, or approval of Nutech's facet fusion product or other commercial activities, in violation of 15 U.S.C. § 1125(a)(1)(A).

23. As a result, Plaintiffs have suffered and continue to suffer monetary damages in an amount to be determined at trial, inclusive of attorneys' fees and costs under 15 U.S.C. § 1117.

24. The damage caused by Mati Medical's actions is not entirely susceptible to ready or precise calculation in that such damage also involves lost profits, lost business opportunities, loss of goodwill and reputation, and confusion of consumers, such that monetary damages alone cannot adequately compensate Plaintiffs for Mati Medical's misconduct. Unless permanently enjoined by the Court, Mati Medical will continue to make false descriptions and representations and to pass off its facet fusion product as affiliated with Plaintiffs, all to Plaintiffs' irreparable injury.

### **SECOND CAUSE OF ACTION**

(Lanham Act Unfair Competition – False Advertising) (15 U.S.C. § 1125(a)(1)(B))

25. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 24 of the Complaint as if fully set forth herein.

26. Mati Medical, through its marketing activities set forth in Paragraphs 15 through 19 above, misrepresents the nature, characteristics and qualities Nutech's/NuFix's facet fusion product and the TruFUSE<sup>®</sup> Products, constituting unfair competition and false advertising in violation of 15 U.S.C. § 1125(a)(1)(B).

27. Further, Mati Medical knew, or could have reasonably anticipated or expected, that their actions would contribute to and further Nutech's/NuFix's acts of unfair

competition and false advertising in violation of 15 U.S.C. § 1125(a)(1)(B).

28. As a result, Plaintiffs have suffered and continue to suffer monetary damages in an amount to be determined at trial, inclusive of attorneys' fees and costs under 15 U.S.C. § 1117.

29. The damage caused by Mati Medical's actions is not entirely susceptible to ready or precise calculation in that such damage also involves lost profits, lost business opportunities, loss of goodwill and reputation, and confusion of consumers, such that monetary damages alone cannot adequately compensate Plaintiffs for Mati Medical's misconduct. Unless permanently enjoined by the Court, Mati Medical will continue to falsely advertise the nature, characteristics and qualities of Nutech's facet fusion product, all to Plaintiffs' irreparable injury.

### **THIRD CAUSE OF ACTION**

(Unfair Competition - Ohio Deceptive Trade Practices Act, Ohio Rev. Code § 4165.02 *et seq.*)

30. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 29 of the Complaint as if fully set forth herein.

31. Mati Medical's conduct constitutes direct and contributory unfair competition and is likely to cause confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of Ohio Rev. Code § 4165.02(A)(2).

32. Mati Medical's conduct constitutes direct and contributory unfair competition and is likely to cause confusion or misunderstanding as to its affiliation, connection, or association with the TruFUSE® Products in violation of Ohio Rev. Code § 4165.02(A)(3).

33. Mati Medical's conduct constitutes direct and contributory unfair competition and disparages Plaintiffs' goods, services, or business and the TruFUSE® Products in

violation of Ohio Rev. Code § 4165.02(A)(10).

34. The damage caused by Mati Medical's actions is not entirely susceptible to ready or precise calculation in that such damage also involves lost profits, lost business opportunities, loss of goodwill and reputation, and confusion of consumers, such that monetary damages alone cannot adequately compensate Plaintiffs for Mati Medical's misconduct. Unless permanently enjoined by the Court, Mati Medical will continue to cause irreparable injury to Plaintiffs unless and until such unfair activities are permanently enjoined by this Court.

#### **FOURTH CAUSE OF ACTION**

(Common Law Unfair Competition)

35. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 34 of the Complaint as if fully set forth herein.

36. Mati Medical has engaged in unfair competition under the common law of the State of Ohio by, among other things, causing confusion in the marketplace as to the origin of Nutech's/NuFix's facet fusion product, mistake or deception as to the nature and extent of an affiliation between Nutech/NuFix and Plaintiffs, or as to the origin, sponsorship or approval of Nutech's/NuFix's products and services.

37. By reason of the foregoing acts, Mati Medical has willfully, intentionally and unfairly competed with Plaintiffs in violation of the common law of the State of Ohio.

38. By reason of Mati Medical's actions alleged herein, Mati Medical has caused, and is continuing to cause, monetary damage to Plaintiffs in an amount to be determined at

trial, and will continue to cause irreparable injury to Plaintiffs unless and until such unfair activities are permanently enjoined by this Court.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs requests the following relief:

(a) That Mati Medical and all persons acting in concert or privity with them, including their respective officers, agents, servants, employees, successors and assigns, jointly and severally, be permanently enjoined from committing any further acts constituting direct and/or contributory unfair competition and false advertising;

(b) That Mati Medical be directed to immediately cease distributing any infringing bone allograft products on behalf of Nutech/NuFix or any other entity;

(c) That Mati Medical be required to file with this Court and serve on Plaintiffs' counsel within 14 days after issuance of a permanent injunction herein, or within such reasonable time as this Court shall direct, a report in writing and under oath setting forth in detail the manner and form in which Mati Medical has complied with such injunction;

(d) That Plaintiffs have judgment against Mati Medical for disgorgement of profits, lost profits and compensatory damages in connection with its distribution of Nutech's/NuFix's competing facet fusion product;

(e) That Plaintiffs be awarded statutory damages, attorney's fees, costs, and prejudgment interest pursuant to 15 U.S.C. § 1117 and Ohio Rev. Code § 4164.03, including but not limited to damages for willful infringement under 15 U.S.C. § 1125(c);

(f) That Plaintiffs be awarded the costs and disbursements of this



**JURY TRIAL REQUESTED**

Plaintiffs Orthopedic Development Corporation and MinSURG Corporation request a jury trial of all issues raised by the Complaint which are triable by jury.

BY: /s/ Michael W. Currie

Michael W. Currie

Attorney for Plaintiffs Orthopedic Development  
Corporation and MinSURG Corporation