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9 Attorneys for Plaintiff
LEVITA MAGNETICS INTERNATIONAL CORP.

10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
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14
15 LEVITA MAGNETICS INTERNATIONAL
CORP., a Delaware corporation,

16 *Plaintiff,*

17 v.

18 ATTRACTIVE SURGICAL, LLC, an
19 Illinois corporation,

20 *Defendant.*
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CASE NO.: _____

**COMPLAINT FOR DECLARATORY
JUDGMENT OF NON-INFRINGEMENT
AND INVALIDITY**

DEMAND FOR JURY TRIAL

1 Plaintiff Levita Magnetics International Corp. (“Levita”) hereby brings this Complaint
2 for Declaratory Judgment against Defendant Attractive Surgical, LLC (“Attractive Surgical”) on
3 personal knowledge as to its own activities and on information and belief as to the activities of
4 others as follows:

5 **NATURE OF THIS ACTION**

6 1. This is an action for declaratory judgment of non-infringement and invalidity of
7 U.S. Patent Nos. 8,602,981 (the “’981 patent”) and 9,386,973 (the “’973 patent”) (collectively,
8 “asserted patents” or “patents-in-suit”) arising under the Declaratory Judgment Act, 28 U.S.C.
9 §§ 2201-2202, and the patent laws of the United States, 35 U.S.C. § 1 et seq. Levita brings this
10 action against Attractive Surgical under the well-established “customer suit exception” of patent
11 law, where a second-filed declaratory judgment action by the manufacturer of an accused
12 product is favored over a patentee’s earlier-filed action against a mere customer or purchaser of
13 the accused product.

14 **THE PARTIES**

15 2. Levita is a corporation organized under the laws of the State of Delaware, with its
16 principal place of business at 1730 South Amphlett Boulevard, Suite 240, San Mateo, California
17 94402, in this judicial district.

18 3. On information and belief, Attractive Surgical is a limited liability company
19 organized under the laws of the State of Illinois, with its principal place of business at 406 Roger
20 Williams Avenue, Highland Park, Illinois 60035.

21 **INTRADISTRICT ASSIGNMENT**

22 4. Pursuant to Civil L.R. 3-2(c) and 3-5(b), this is an Intellectual Property Action
23 subject to assignment on a district-wide basis.

24 **BACKGROUND**

25 **A. The Patents-In-Suit and Attractive Surgical**

26 5. The ’981 patent, entitled “Magnaretractor System and Method,” states on its face
27 that it issued on December 10, 2013 and that its inventor is Todd Deutch. A true and correct
28 copy of the ’981 patent is attached as Exhibit A. On information and belief, Attractive Surgical

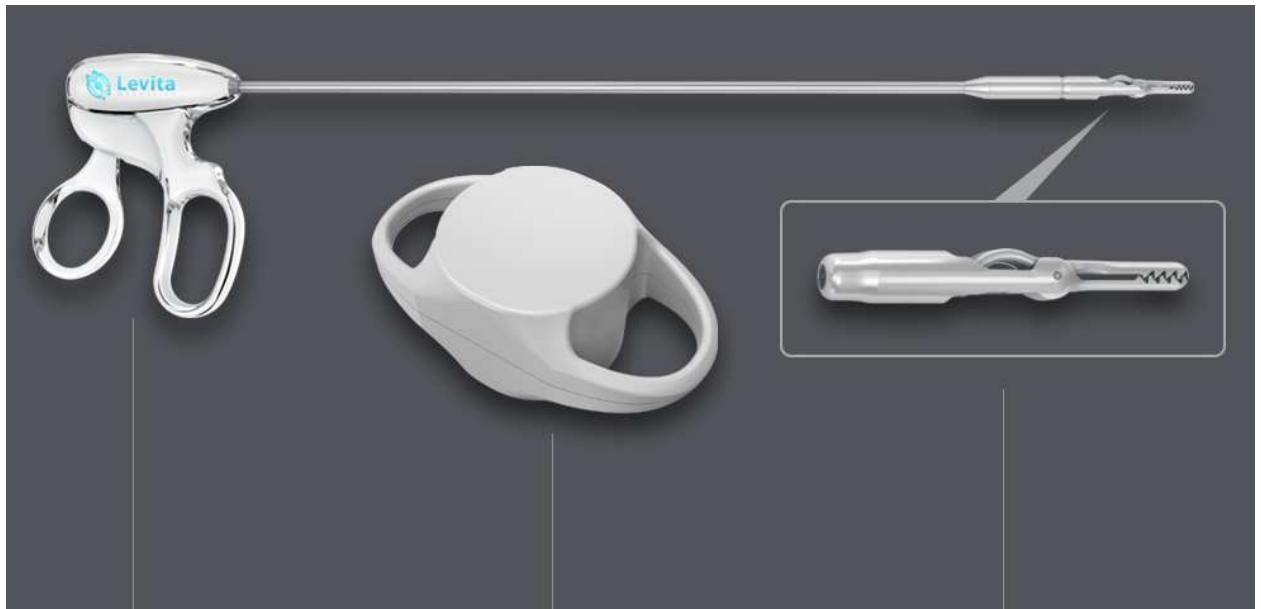
1 (“AS”) purports to be the assignee of the ’981 patent and has asserted that it was assigned all
 2 rights to enforce the patent.

3 6. The ’973 patent, entitled “Magnaretractor System and Method,” states on its face
 4 that it issued on July 12, 2016 and that its inventor is Todd Deutch. A true and correct copy of
 5 the ’973 patent is attached as Exhibit B. On information and belief, AS purports to be the
 6 assignee of the ’973 patent and has asserted that it was assigned all rights to enforce the patent.

7 7. On information and belief, AS was formed by Dr. Todd Deutch (“Deutch”) and
 8 Dr. Charles Miller (“Miller”). Deutch is the named inventor on the ’981 and ’973 patents, and
 9 purports to have assigned his interest in the patents-in-suit to AS and acts on behalf of AS. On
 10 information and belief, AS is a non-manufacturing and non-practicing entity.

11 **B. Levita and Its Magnetic Surgical System**

12 8. Plaintiff Levita is the sole designer, manufacturer, and supplier of its product, the
 13 Levita Magnetic Surgical System. Levita’s product consists of a magnetic grasper with a
 14 detachable grasper tip and an external magnet as shown below:



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Magnetic Grasper
 Shaft removed from
 trocar after delivery
 and application of tip

External Magnetic Controller
 Externally positioned to
 magnetically attract and maneuver
 tip inside patient

Grasper Tip
 Detachable distal tip grasps
 target tissue and provides
 retraction unconstrained by trocar

25
26
27 9. One of Levita’s missions is to minimize the surgical footprint of invasive medical
 28 procedures on patients through its innovative Magnetic Surgery® platform. Levita’s Magnetic

1 Surgical System product reduces the total number of incisions during surgery and eliminates the
2 need for a dedicated trocar, which can be associated with risks relating to bowel or vessel injury,
3 scarring, hernias, and infection. Additionally, the Magnetic Surgical System provides surgeons
4 with better access and visualization during a medical procedure.

5 10. On February 10, 2015, Levita filed a medical device application with the United
6 States Food and Drug Administration (“FDA”) for commercialization of its Magnetic Surgical
7 System—the first of its kind—for use in gallbladder removal procedures. It received FDA
8 approval on June 13, 2016, and the FDA created a new classification “Magnetic Surgical
9 Instrument System” for medical devices. The FDA subsequently granted Levita an expanded
10 indication to market its Magnetic Surgical System for use in bariatric and prostatectomy
11 procedures.

12 11. Levita has sold its FDA-approved Magnetic Surgical System to various
13 prestigious medical institutions including the Cleveland Clinic in Ohio, Duke Medical in North
14 Carolina, and UT Southwestern Medical Center in Texas for use in certain surgical procedures.

15 12. Dr. Alberto Rodriguez-Navarro (“Rodriguez-Navarro”) is a board-certified
16 surgeon and the founder of Levita, as well as its current President and Chief Executive Officer
17 (“CEO”). Rodriguez-Navarro resides in San Francisco, California.

18 **C. Interactions Between AS and Levita**

19 13. Over the course of several years, from about 2015 to about 2017, AS and Levita
20 engaged in protracted business discussions regarding a potential collaboration. During that time,
21 AS also accused Levita of infringing the ’981 patent, which was the first patent issued of the
22 patents-in-suit. (The later-issued ’973 patent was a direct continuation of the ’981 patent.) The
23 parties were unable come to an agreement, after which AS went silent for approximately two
24 years.

25 14. Then on May 28, 2019, AS filed suit for patent infringement—not against
26 Levita—but against one of Levita’s customers, the Cleveland Clinic Foundation (“CCF”), in the
27 Northern District of Ohio, C.A. No. 19-01212 (“AS’s Ohio Complaint”). AS’s Ohio Complaint
28

1 alleged that CCF's *use* of Levita's Magnetic Surgical System is what infringes AS's patents-in-
2 suit. Ex. C (AS's Ohio Complaint) at 2, ¶ 6.

3 15. On July 1, 2019, Levita filed two Petitions for *inter partes* review ("IPR") with
4 the United States Patent Trial and Appeal Board ("PTAB"), one for each of the present patents-
5 in-suit. These exact same two patents (the '981 patent and the '973 patent) have been asserted
6 by AS in Northern District of Ohio against CCF. Levita's Petitions assert that both patents-in-
7 suit are invalid over prior art.

8 16. On information and belief, on or about July 29, 2019, AS also sent a cease and
9 desist letter to the Deputy General Counsel for Health Affairs of the Duke University Health
10 System concerning Duke University Medical Center ("Duke Medical") in Durham, North
11 Carolina. Ex. D. Notably, Duke Medical is also a mere customer of Levita.

12 17. AS's cease and desist letter accuses Duke Medical of infringing both of the
13 patents-in-suit, as well as a third continuation patent (U.S. Patent No. 10,335,134) (the "'134
14 patent") "through [Duke Medical's] use of the Magnetic Surgical System made and provided by
15 Levita Magnetics International Corp." *Id.* On information and belief, the '134 patent recently
16 issued on July 2, 2019.

17 18. Pursuant to the customer suit exception, which has been a well-recognized
18 doctrine in patent infringement disputes, Levita now brings this Complaint for Declaratory
19 Judgment against AS in the Northern District of California. The Northern District of California
20 is the most appropriate and practical forum in which to resolve AS's dispute with Levita—the
21 true target of AS's legal actions—as well as the most efficient forum, as this declaratory
22 judgment action will avoid piecemeal and duplicative litigation against third parties such as CCF,
23 who are mere customers of Levita.

24 **PERSONAL JURISDICTION**

25 19. This Court has personal jurisdiction over AS for at least the following reasons.

26 **A. Deutch and AS's Proposed Business Dealings with Levita**

27 20. On information and belief, on or about September 28, 2015, Deutch sent a letter
28 via First Class Mail to Rodriguez-Navarro in his capacity as Founder, President, and CEO of

1 Levita. On its face, Deutch's letter was expressly addressed to Levita's corporate headquarters
2 in San Mateo, California. In his letter, Deutch represented that he had been working on a
3 magnetic surgical system that was allegedly proprietary and covered by the '981 patent and by
4 pending U.S. patent applications. Deutch indicated that he wished to discuss a potential
5 collaboration with Levita, and that he was aware Levita was developing a magnetic surgical
6 system for which it had submitted an application for review by the FDA. Deutch further pursued
7 initiating this relationship with Levita in San Mateo, California in October of 2015.

8 **B. Deutch and AS Pursue a Business Relationship with Levita Into 2016**

9 21. Throughout October 2015 and November 2015, Deutch continued to pursue
10 business negotiations with Levita in San Mateo, California through multiple in-person, email,
11 and telephone correspondences. In November 2015, the relationship being contemplated was a
12 collaboration between Levita, Deutch, and Miller to develop technologies relating to surgical
13 procedures. Deutch and Miller (collectively, AS) offered to serve as advisors to Levita in San
14 Mateo, California in exchange for certain compensation and equity, and Levita would receive
15 AS's past and future intellectual property ("IP") rights.

16 22. On information and belief, negotiations regarding the terms of the potential
17 relationship between Levita/Rodriguez-Navarro and AS/Deutch continued through November
18 2015 and into early 2016 via numerous emails and telephone communications.

19 23. On or about March 23, 2016, Deutch emailed Levita to further inquire about the
20 status of negotiations. On or about April 4, 2016, Levita and AS had another conference call.
21 Ultimately, the negotiations between the parties stalled due to unreasonable and ever-changing
22 demands by Deutch and AS.

23 **C. Counsel for Deutch and AS Sent a Demand Letter Alleging Patent Infringement**
24 **Addressed to Levita in San Mateo, California**

25 24. On or about May 18, 2016, Mr. David A. Giordano of Giordano & Chavous LLC
26 ("Giordano") sent Levita a letter via First Class mail and email. Giordano's letter was expressly
27 addressed to Levita's corporate headquarters in San Mateo, California. The Giordano letter was
28 directed to Rodriguez-Navarro in his capacity as Founder, President, and CEO of Levita. In his

1 letter, Giordano stated that he represented Deutch and AS. Giordano further represented that AS
2 was and is the owner of the '981 patent, and further stated that both Deutch and Giordano's firm
3 were of the opinion that Levita's Magnetic Surgical System was covered by the claims of the
4 '981 patent. The Giordano letter demanded that Levita provide an analysis of non-infringement
5 if Levita did not believe the claims of the '981 patent covered its Magnetic Surgical System. On
6 information and belief, AS sent Levita this letter with the knowledge that targeting Levita could
7 subject AS to personal jurisdiction in this District, particularly when combined with AS's other
8 activities directed to Levita and residents of this District.

9 25. The May 18, 2016 Giordano letter only identified the '981 patent, as the '973
10 patent did not issue until July 12, 2016. The '973 patent is a direct continuation of the '981
11 patent, and both share a common specification.

12 26. On or about May 27, 2016—before the '973 patent had issued—Levita responded
13 to Giordano, disagreeing with Giordano's assertions that the '981 patent covered Levita's
14 Magnetic Surgical System, and noting that the '981 patent is likely invalid. Levita further stated
15 that while it and Deutch had discussed a business arrangement, the discussions ceased when
16 Deutch continued to make escalating and grossly overreaching demands regarding the terms of
17 any business relationship. Nevertheless, Levita expressed that it remained open to negotiations
18 with Deutch and AS.

19 **D. Deutch and AS Resume Business Discussions with Levita in 2016**

20 27. On or about August 2016, AS resumed business negotiations with Levita. Based
21 on these discussions, on or about August 9, 2016, Levita undertook the drafting of documents
22 with certain key terms demanded by Deutch and AS.

23 28. On or about August 19, 2016, Levita sent a draft term sheet and its standard
24 Consulting Agreement to Deutch and AS.

25 29. On or about September 2, 2016, Deutch provided revisions to the Levita-AS term
26 sheet. The changes included, *inter alia*, that AS would license, not assign, its IP rights to Levita,
27 and that Levita would bear the costs of maintaining, enforcing, and defending AS's patents,
28 which at that point, included both the '981 and '973 patents. Thus, AS sought to have more

1 involvement, connection, and control over Levita in San Mateo, California than originally
2 proposed by Levita. On information and belief, Deutch and Levita continued negotiations
3 throughout September 2016.

4 30. After additional communications throughout October 2016, the parties agreed on
5 certain non-binding terms for a potential further agreement on or about November 4, 2016. The
6 non-binding terms included, *inter alia*, an exclusive license to Levita of AS's patents (*i.e.*, the
7 current patents-in-suit), certain equity ownership for AS in Levita, and royalty payments to AS.

8 **E. AS Pursues a Signed Final License Agreement with Levita:**

9 31. On or about December 3, 2016, and based on the parties' executed non-binding
10 term sheet, Levita sent AS a draft license agreement. Deutch, on behalf of AS, continued to
11 correspond via email and telephone with Levita in San Mateo, California throughout December
12 2016 and into 2017. Deutch continued to inquire into Levita's funding, financing, and
13 valuation—requesting additional financial information from Levita for AS's review and
14 evaluation.

15 32. On information and belief, the parties corresponded intermittently in March and
16 April of 2017 in an attempt to coordinate further discussions.

17 33. On or about June 16, 2017, Deutch contacted Rodriguez-Navarro, and represented
18 that AS was still pushing things forward. The parties continued to email through June 2017 and
19 July 2017, but any progress on reaching a final agreement stalled thereafter.

20 **F. AS Sues Cleveland Clinic Foundation, a Levita Customer, Alleging Infringement of**
21 **the '981 and '973 Patents, the Same Two Patents-In-Suit Here**

22 34. After staying silent for almost two years, rather than filing suit directly against
23 Levita, AS elected instead to file suit on May 28, 2019 in the Northern District of Ohio against
24 one of Levita's customers, the Cleveland Clinic Foundation ("CCF"). Ex. C (AS's Ohio
25 Complaint). Tellingly, Levita's website identifies CCF as one of its customers. CCF purchases
26 and uses Levita's Magnetic Surgical System.

27 35. In its Ohio Complaint, AS alleges that CCF infringes the '981 and '973 patents
28 based *solely* on its use of Levita's Magnetic Surgical System. *Id.* at 2, ¶ 6. Thus, on information

1 and belief, the *only* basis for AS's complaint in the Northern District of Ohio is CCF's status as a
2 Levita customer. Levita itself has *no* regular and established place of business in Ohio.

3 **G. Levita's IPR Petitions**

4 36. On July 1, 2019, Levita filed Petitions for *inter partes* review with the PTAB on
5 each of the '981 and '973 patents. The Petitions assert that each of the patents-in-suit is invalid
6 over prior art.

7 **H. AS Continues to Threaten Other Levita Customers**

8 37. On information and belief, on or about July 29, 2019, AS continued its indirect
9 attacks on Levita by sending a cease and desist letter to the Deputy General Counsel for Health
10 Affairs at Duke Medical in Durham, North Carolina. Ex. D. Like CCF, Duke Medical is a mere
11 customer of Levita. Levita has *no* regular and established place of business in North Carolina.

12 38. AS's cease and desist letter accuses Duke Medical of infringing both of the
13 patents-in-suit, as well as a third recently issued continuation patent, the '134 patent, "through
14 [Duke Medical's] use of the Magnetic Surgical System made and provided by Levita Magnetics
15 International Corp." *Id.* Again, clearly the true target of AS's actions is Levita and its Magnetic
16 Surgical System. In an attempt to perform an end run around the venue restrictions imposed by
17 the United States Supreme Court's decision in *TC Heartland*, rather than sue Levita in the
18 federal district where Levita resides or has a regular and established place of business (*i.e.*, San
19 Mateo, California), and despite AS's years of direct interactions with Levita, AS has instead
20 chosen to target mere customers of Levita in venues such as Ohio and North Carolina where
21 Levita neither resides nor has a regular and established place of business. *TC Heartland LLC v.*
22 *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017) (finding "definitively and
23 unambiguously" that a domestic corporation's residence within the meaning of the patent venue
24 statute, 28 U.S.C. § 1400(b), refers only to its state of incorporation); *In re Cray*, 871 F.3d 1355,
25 1362-63 (explaining that a "regular and established place of business" is where a business is
26 carried on regularly with sufficient permanence).

1 **I. Summary**

2 39. AS's course of conduct, both directly and indirectly against Levita—including its
3 May 18, 2016 letter from its counsel to Levita in San Mateo, California threatening patent
4 infringement; AS's suit against CCF, a Levita customer in Ohio; and most recently, AS's cease
5 and desist letter to Duke Medical—all support a conclusion that there is a justiciable case and
6 controversy between AS and Levita.

7 40. In particular, as Levita is the sole supplier and manufacturer of the Magnetic
8 Surgical System, which is AS's only basis for accusing CCF of patent infringement in Ohio, and
9 as CCF is Levita's customer, jurisdiction over this case is appropriate under the well-established
10 "customer suit exception" to the first-filed rule in patent law. The customer suit exception
11 mandates that when a mere customer—*i.e.*, one who may have simply purchased an allegedly
12 infringing product from a manufacturer—is sued by a patent owner for infringement in a first-
13 filed action, a second-filed declaratory judgment action brought by the product manufacturer
14 against the patent owner should take precedence. *Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1464
15 (Fed.Cir.1990); *see also Kahn v. GM Corp.*, 889 F.2d 1078, 1081 (Fed.Cir.1989) ("customer suit
16 exception is based on the manufacturer's presumed greater interest in defending its actions
17 against charges of patent infringement; and to guard against possibility of abuse").

18 41. For at least the reasons above, AS has engaged in actionable conduct in this
19 District. AS has continuously and systematically attempted to force a license (and other onerous
20 terms) based on the patents-in-suit on Levita, a resident of this District, including threats of
21 patent infringement. This District therefore has an interest in this action because it directly
22 involves a resident of this District; thus, this District has personal jurisdiction over AS.
23 Exercising jurisdiction over AS in this case is consistent with the United States Constitution and
24 federal laws. Moreover, this declaratory judgment action against AS, the patent owner, should
25 proceed first in the interests of efficiency, judicial economy, and fairness over a suit concerning a
26 mere customer and purchaser of Levita's product, such as CCF.

PRAYER FOR RELIEF

1
2 WHEREFORE, Levita respectfully requests that the Court enter judgment in its favor and
3 against AS (“Attractive Surgical”) as follows:

- 4 (a) Declaring that Levita has not infringed, induced others to infringe, or contributed
5 to the infringement of any claim of the ’981 patent, directly or indirectly, literally
6 or under the doctrine of equivalents;
- 7 (b) Declaring each and every claim of the ’981 patent invalid;
- 8 (c) Enjoining Attractive Surgical, its officers, owners, partners, employees, agents,
9 parents, subsidiaries, attorneys, and anyone acting in concert or participation with
10 any of it, from making any claims that Levita and/or its customers infringe the
11 ’981 patent;
- 12 (d) Declaring that Levita has not infringed, induced others to infringe, or contributed
13 to the infringement any claim of the ’973 patent, directly or indirectly, literally or
14 under the doctrine of equivalents;
- 15 (e) Declaring each and every claim of the ’973 patent invalid;
- 16 (f) Enjoining Attractive Surgical, its officers, owners, partners, employees, agents,
17 parents, subsidiaries, attorneys, and anyone acting in concert or participation with
18 any of it, from making any claims that Levita and/or its customers infringe the
19 ’973 patent;
- 20 (g) Declaring that judgment be entered in favor of Levita and against Attractive
21 Surgical;
- 22 (h) Finding that this is an exceptional case pursuant to 35 U.S.C. § 285;
- 23 (i) Awarding Levita its attorneys’ fees, costs, and expenses incurred in this action;
24 and
- 25 (j) Granting Levita such other and further relief as the Court may deem just and
26 proper.
27
28

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38 and Civil L.R. 3-6(a), Levita hereby demands a jury trial of all issues triable to a jury.

Dated: August 8, 2019

WILSON SONSINI GOODRICH & ROSATI, P.C.

By: /s/ Vera M. Elson
Vera M. Elson

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