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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FRONTIER DEVICES, INC., a Corporation,	)	
	)	
Plaintiff,	)	**CIVIL ACTION No. 2:10-cv-01796-RDP**
v.	)	
	)	**JURY TRIAL DEMANDED**
MINSURG CORPORATION, INC., a Corporation, MINSURG INTERNATIONAL, INC. f/k/a ORTHOPEDIC DEVELOPMENT CORPORATION, a Corporation,	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

Plaintiff, Frontier Devices, Inc. ("Frontier Devices"), and in its second amended complaint against minSURG Corporation Inc., and minSURG International, Inc., f/k/a Orthopedic Development Corporation (referred to collectively as "minSURG" or "Defendants"), alleges as follows:

NATURE OF ACTION

1. This is an action for declaratory relief under 28 U.S.C. §§ 2201(a) and 2202 and the patent laws of the United States, 35 U.S.C. § 271, *et seq.*; unfair competition and false advertising arising under § 43(a) of the Lanham Act, 15

U.S.C. § 1125(a); and defamation and intentional interference with business and contractual relations under Alabama state law.

PARTIES

2. Frontier Devices is a corporation organized under the laws of the State Alabama with its principal place of business at 153-A Cahaba Valley Parkway, Pelham, Alabama 35124.

3. minSURG International, formerly known as Orthopedic Development Corporation, is a corporation organized and existing under the laws of the State of Florida with its principal place of business at 611 Druid Road East, Suite 200, Clearwater, Florida 33756.

4. minSURG Corporation is a corporation organized and existing under the laws of the State of Florida with its principal place of business at 611 Druid Road East, Suit 200, Clearwater, Florida 33756. On information and belief, minSURG Corporation is a wholly owned subsidiary of minSURG International.

JURISDICTION AND VENUE

5. This Court has subject mater jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338 as it involves substantial claims arising under the Patent laws of the United States. Diversity jurisdiction also exists under 28 U.S.C. § 1332 and the amount at issue is greater than $75,000.00.

6. Personal jurisdiction and venue are proper in this district under 28 U.S.C. §§ 1391 and 1400(b) because minSURG, acting through its employees and agents, has expressly charged in this judicial district that Plaintiff Frontier Devices is infringing U.S. Patent No. 7,708,761 B2 ("the '761 patent"). Further, minSURG maintains continuous and systematic commercial contacts within the State of Alabama and has purposefully solicited business in the State of Alabama, negotiated directly with hospitals and/or physicians in the State of Alabama and, on information and belief, entered into contracts with Alabama businesses resulting in the distribution of Defendants' goods throughout the State and this District.

PARTIES' BACKGROUND

7. In 2003, Orthopedic Development Corporation ("ODC") was incorporated in Florida. James Doulgeris ("Doulgeris") and Dr. David Petersen ("Petersen") were the initial officers and/or directors of ODC.

8. In 2004, minSURG Corporation was incorporated in Florida. As with ODC, Doulgeris and Petersen were the initial officers and/or directors of minSURG Corporation.

9. minSURG markets a bone dowel for facet fusion under the name "TruFUSE." The TruFUSE bone dowel consists of a cylindrical design with a slight taper. minSURG also markets instruments to be used with the TruFUSE

bone dowel. These instrument are modifications of instruments regularly used in orthopedic surgery generally, and minimally invasive spinal surgery specifically.

10. In September 2005, Petersen, as inventor, filed a utility patent application, serial number 11/232,519 ("the '519 application"), entitled "Spinal Plug for Minimally Invasive Facet Joint Fusion System." On May 4, 2010, a patent was issued on this application and assigned U.S. Patent No. 7,708,761. Attached hereto as Exhibit A is a true and correct copy of the '761 patent. Petersen assigned all rights and interest in the '761 patent to ODC.

11. In June 2008, minSURG International was incorporated in Florida. In June 2009, minSURG International voluntarily dissolved and abandoned the minSURG International name. In the same month, ODC adopted the name minSURG International and abandoned the ODC name. Consequently, minSURG International now owns the '761 patent.

12. Frontier Devices, Inc. was incorporated in August 2007. Frontier Devices is involved in the manufacture and distribution of medical implant products, including machined allograft cortical bone dowels designed for insertion into facet joints for fusing the joints together. Frontier Devices has developed a proprietary system for implanting bone dowels that are currently marketed under the name "Fusio." The Fusio system incorporates unique instruments and procedures. The Fusio system arose from a desire to address the problem of the

TruFUSE graft "backing out," i.e., working its way out of the facet joint after a seemingly successful implantation. "Backing out" is a common problem experienced by surgeons using the TruFUSE product.

13. Over the years, Frontier Devices has developed extensive and valuable relationships with physicians, hospitals, tissue banks, local and regional distributors and sales representative, and other important stakeholders in the industry.

BACKGROUND OF SPINAL FUSION TECHNIQUES

14. Back pain is one of the most common ailments in adults. For decades physicians have utilized techniques for fusing segments for the spine to relieve spinal pressure and pain. Many of these techniques involve the use of bone grafts and tissue bank allografts in various configurations and locations, to encourage spinal fusion. Of particular interest here, cylindrical bone dowels have historically been used routinely in fusion procedures and made available by several companies for this purpose.

15. One recognized location for surgical spinal fusion is at the spinal facet joints. Facet fusions can be carried out alone or in combination with other surgical techniques.

16. Since at least the 1950's, surgeons have reported the successful fusion of spinal facet joints following the insertion of bone grafts into the joints.

17. In the 1980's and 1990's, increasing emphasis was placed on the development of techniques for minimally invasive surgery, including spinal fusion. Numerous percutaneous, endoscopic, laparoscopic and arthroscopic techniques were developed.

18. By 1993, a percutaneous technique for spinal facet fusion, which involved drilling a hole directly into the facet joint and inserting a cylindrical bone dowel, had been developed and reported in the literature. *See* Stein M., *et al*., Percutaneous facet joint fusion: preliminary experience, *J. Vasc. Interv. Radiol*. 1993 Jan-Feb; 4(1): 69-74 (hereinafter the Stein Paper).

DEVELOPMENT OF THE TRUFUSE PRODUCT AND PROSECUTION OF THE '761 PATENT

19. Upon information and belief, Petersen is an orthopedic surgeon practicing in the Tampa, Florida area. He served at all relevant times as Chairman of the Board and Chief Medical Officer for minSURG.

20. Upon information and belief, Petersen was aware of developments in the area of minimally invasive spinal surgery.

21. On November 22, 2004, Petersen filed U.S. Patent Application No. 10/992,270 ("the '720 application") for "Minimally Invasive Facet Joint Fusion." This application described an arthroscopic technique for fusing the facet joint by drilling or boring a hole or holes perpendicularly through the joint and inserting bone grafts through these holes.

22. Petersen was aware of the Stein Paper, and disclosed its existence and potential relevance to the United States Patent and Trademark Office ("USPTO") in an Information Disclosure Statement filed in connection with the '720 application.

23. Upon information and belief, during the prosecution of the '720 application, Petersen became dissatisfied with the technique described in the '720 application. He sought to develop instead a technique based on the one described in the Stein Paper. This would involve the drilling of a hole directly into, rather than perpendicularly through, the facet joint, for the insertion of a bone graft.

24. In September 2005, Petersen filed the '519 application for "Spinal Plug for a Minimally Invasive Facet Joint Fusion System." This application claimed to be a continuation in part of the '720 application, though it described a different facet fusion technique, one based on the Stein Paper. The claims of this new application were limited to the use of a bone dowel of a specified cylindrical shape.

25. On or about March 6, 2007, the USPTO issued a non-final rejection of the '720 application based on a variety of problems, including obviousness in light of previously patented surgical techniques and devices. Petersen and ODC abandoned the '720 application and only proceeded with the '519 application.

26. Petersen and ODC filed a new Information and Disclosure Statement in connection with the '519 application listing several of the same references cited in connection with the '720 application, but failing to include the Stein Paper.

27. After their failure to disclose clearly relevant prior art[1] was publically pointed out in connection with prior litigation, Petersen and ODC filed another Information and Disclosure Statement in connection with the '519 application. However, rather than calling the attention of the USPTO to the importance of the Stein Paper, Petersen and ODC submitted the reference to the USPTO in combination with more than one hundred other new references, many of which were duplicative or irrelevant. In so doing, Petersen and Stein relegated the Stein Paper to the proverbial needle in a haystack. Upon information and belief, this was done in a continued effort to hide from the USPTO the clear import of the Stein Paper on the patentability of the subject mater of the '519 application.

28. Over the course of the prosecution of the patent, including in response to several rejections by the examiner, minSURG amended its claims or substituted new claims, effectively narrowing the scope of the proposed patent.

29. Eventually, and without the benefit of proper and forthright disclosure of information regarding the Stein Paper, on or about July 2, 2009, the USPTO indicated that it would issue a patent based on the '519 application.

[1] Generally, prior art refers to all information that has been disclosed to the public in any form about an invention before a given date.

30. On or about August 7, 2009, the Stein Paper was finally brought directly to the attention of the USPTO by a third party. The USPTO promptly withdrew its notice of issuance to permit further evaluation of the patent.

31. In the course of further evaluation, minSURG again modified and narrowed the claims of the patent. Ultimately, all of the proposed claims were limited to techniques involving the use of a minimally invasive "portal." This was an obvious attempt to avoid the preclusive effects of the Stein Paper and other similar prior art facet fusion references, by focusing on the use of a portal, rather than on the minimally invasive placement of an allograft dowel in the facet joint, a concept already clearly described in the Stein Paper.

32. As part of this strategy, minSURG resurrected drawings and concepts from the '720 application which had been previously discarded, including drawings depicting the use of drilling or cutting instruments placed through a "portal" or tube. minSURG also represented that a "drill guide" could be placed through the portal to assist in the drilling process.

33. Once again, however, minSURG failed to comply with its duty of candor to the USPTO. In particular, it failed to disclose numerous prior art published references that disclose the use of a "minimally invasive portal" to perform spinal surgery, including surgery on the facet joints, was well-known to

spinal surgeons by the mid to late 1990's. In light of these prior art references and the Stein Paper, the "technique" now claimed in the '519 application was obvious.

34. On May 4, 2010, the '519 application was approved, and the '761 patent issued. In the course of approving the application, however, the examiner required further amendment to the claims, limiting the scope of each to "an arthroscopic type portal facet surgical method." Such a method was described in the patent specification as involving "a small incision and progressive dilation of the intervening soft tissue," in order to place a cylindrical portal through which the joint is accessed and surgical tools placed. The examiner also issued reasons for allowance, focusing on the distinction between a portal-based approach and what he perceived to be more "open" surgical approaches to the facet joint described in the prior art.

35. The plain language of the claims as allowed, therefore, restrict the scope of the patent to a surgical technique involving progressive dilation and placement of a tube or "portal" to provide the only access to the facet joint, and exclude any other techniques for access to the joint, such as an open or mini-open procedure which would allow direct visualization or contact with the joint. The prosecution history makes it clear that these limitations were critical to, and indeed were the basis of, the arguments for allowance made to the USPTO.

RECENT EVENTS AND MINSURG'S CAMPAIGN OF HARASSMENT

36. Having succeeded in convincing the USPTO to issue a patent on this basis, minSURG has now reversed course and is attempting to convince the marketplace that its patent in fact covers any facet fusion surgical technique that involves an allograft dowel and a drill guide, including classic “open” procedures. This is despite the fact that the prosecution history of the '519 application clearly establishes that the claims of the '761 patent are limited to surgical techniques involving, among other things, placement of a “portal” through a "minimally invasive incision" to provide the only access to the facet joint. Thus, the claims of the '761 patent cannot be expanded to cover techniques including placement of a portal through an "open" incision, for example, as performed in classic "open procedures.

37. In the vast majority of cases, the Fusio system is used by physicians in an open or semi-open surgical procedure which does not involve the use of progressive dilation or an “arthroscopic portal.” Upon information and belief, the same is true of many other competing facet fusion allografts on the market. The claims of the ‘761 patent cannot reasonably be interpreted to cover such open and semi-open procedures, particularly in light of the prosecution history discussed above. Accordingly, the ‘761 patent, even if valid, does not bar the manufacture and sale of the Fusio system and other competing facet joint fusion allografts, as

these products are useful in numerous non-infringing and medically beneficial procedures.

38. minSURG is fully aware of the limitations and deficiencies of the ‘761 patent. Nonetheless, consistent with its past pattern of behavior, minSURG has embarked on a campaign to improperly leverage the ‘761 patent in order to interfere with Frontier Devices' business and hamper fair competition in the marketplace. Indeed, minSURG's campaign of misinformation and intimidation started during the prosecution of the '519 application and has continued until today.

39. In January of 2010, before issuance of the Notice of Allowance on January 29, 2010, in the '519 application, and thus before minSURG could have known whether a patent would issue from the '519 application or the scope of coverage to be afforded by such a patent, minSURG's representatives began communicating to Frontier Devices' potential customers that minSURG would be awarded a patent for the TruFUSE system that would prevent Frontier Devices and other facet fusion system manufactures from marketing a facet joint fusion system. This was despite the fact that at the time these communications were made all of the claims of the '519 application were rejected and already sufficiently narrow to allow the manufacture and sale of the Fusio system and other competing facet joint fusion allograft systems for use in numerous non-infringing procedures. Such communications were false and misleading, and upon information and belief, were

made with the intent of deceiving Frontier Devices' potential customers into believing that in the future the sole source for facet joint fusion allografts systems would be minSURG. Upon further information and belief, such communications caused potential customers of Frontier Devices to abstain from purchasing the Fusio system.

40. In March of 2010, after entry of the Notice Allowance on January 29, 2010, but before issuance of the '761 patent, representatives of minSURG communicated to at least one physician who used the Fusio system solely in non-infringing open procedures that the physician would soon be required to cease using the Fusio system and switch to minSURG's TruFUSE system since the physician, the distributors of the Fusio system and Frontier Devices would infringe minSURG's soon-to-be awarded patent if they continued to distribute or use the Fusio system. This was despite the fact that at the time these communications were made all of the allowed claims of the '519 application were sufficiently narrow to allow the manufacture and sale of the Fusio system for use in numerous non-infringing procedures. Thus, such communications were false and misleading, and upon information and belief, were made with the intent of deceiving the physician into believing that in the future the sole source for facet joint fusion allografts systems would be minSURG.

41. In march of 2010**, a**fter entry of the Notice Allowance on January 29, 2010, but before issuance of the '761 patent, representatives of minSURG communicated to a potential distributor of the Fusio system that the distributor should not distribute any facet joint fusion system other than the TruFUSE system or associate with any other manufacturer of facet joint fusion systems, other than minSURG, since to do so would subject the distributor to a lawsuit based upon the yet-to-be issued '761 patent. This was despite the fact that at the time these communications were made all of the allowed claims of the '519 application were sufficiently narrow to allow the manufacture and sale of the Fusio system for use in numerous non-infringing procedures. Thus, such communications were false and misleading. As a result of minSURG's false and misleading communication, the potential distributor chose not to distribute the Fusio system.

42. In addition, about two weeks before the '761 patent issued, minSURG circulated a threatening memorandum to potential distributors for Frontier Devices stating that the '761 patent "covers the use of ***any*** facet fusion plug that is inserted through a portal into the facet joints. Hence, infringers of TruFUSE would include manufacturers of bone dowels used for facet fusion (makes), doctors and hospitals (uses) distributorships and their principals and reps (offers for sale and sells)." (emphasis theirs). The press release went on to state that "[o]ur options to stop the competition are numerous both in terms of business decisions as well as legal

actions." minSURG circulated this memorandum despite the fact that at the time the memorandum was circulated all of the allowed claims of the '519 application were sufficiently narrow to allow the manufacture and sale of the Fusio system and other competing facet joint fusion allograft systems for use in numerous non-infringing procedures. Thus, the memorandum was false and misleading, and upon information and belief, circulated with the intent of deceiving medical device distributors into believing that in the future the sole source for facet joint fusion allografts systems would be minSURG. Upon further information and belief, the memorandum caused potential distributors for Frontier Devices to abstain from distributing the Fusio system.

43. Following issuance of the '761 patent, minSURG accused Frontier Devices of infringing the '761 patent, including via a letter from its intellectual property counsel attached as Exhibit B.

44. Of even greater concern, representatives of minSURG have approached doctors and hospitals who are established customers of Frontier Devices and have falsely represented to these customers that minSURG has filed litigation and obtained an "injunction" against Frontier Devices. minSURG's agents have falsely represented that, as a result of the injunction, the Fusio system will soon be completely unavailable and have urged these customers to purchase the TruFUSE product from minSURG instead.

45. minSURG has also directed a similar campaign against Frontier Devices' current distributors, sending them letters accusing them of infringement and threatening them with suit. One such letter to a distributor states that the distributor is:

> directly infringing and/or inducing the infringement of the '761 Patent. The minSURG patent covers the use of a facet joint fusion plug (***without regard to size/shape/etc/)*** that is inserted through a portal ***(e.g. a drill guide)*** to be placed in between the facet joints. The minSURG patent also protects surgeries which are performed stand-alone or adjunctively to other surgical procedures.

See Letter to Mr. Oscar Hernandez of Medical Solutions of Texas from Don J. Pelto, June 16, 2010, attached hereto as Exhibit C (emphasis in original). The letters conveniently omit any mention of the minimally invasive, arthroscopic portal-type limitations in the patent. Indeed, the letter misrepresents that the use of a facet fusion plug and drill guide even in a completely open procedure would violate the patent. This misrepresentation is compounded by the assertion that the use of facet fusion as an adjunct to other surgical procedures would be covered by the patent. In fact, this would almost never be true, as such combined procedures almost always involve open surgical access to the spine, including the facet joints.

46. The letters sent by minSURG grossly overstate the scope of the '761 patent and are obviously designed to stymie competition in the marketplace and to intimidate Frontier Devices' distributors and customers into ceasing further business with Frontier Devices. Several of these distributors distribute the Fusio

system only to physicians who use the Fusio system in non-infringing open procedures. In June of 2010, two such distributors decided to cease promoting the Fusio system for fear of being sued by minSURG, even though the Fusio systems they distributed were used in non-infringing and medically beneficial procedures.

47. minSURG has no legitimate basis for making such harmful and derogatory statements regarding Frontier Devices and its products. minSURG has made such statements without objective basis or justification, and for the sole purpose of stymieing competition, deceiving the public, interfering with Frontier Devices' established business relationships, and preventing the Frontier Devices from marketing a lawfully competitive product. The business of Frontier Devices has been, and will continue to be, damaged and irreparably harmed by MinSURG's conduct.

48. minSURG has directed similar attacks on other competitors in the facet joint fusion market.

FLORIDA ACTION

49. On July 19, 2010, Defendant minSURG International, Inc. filed a complaint in the United States District Court for the Middle District of Florida (hereinafter referred to as the "Florida Action") alleging, among other things, that Frontier Devices is infringing the '761 patent by offering the Fusio system and

training practitioners in its use. Attached hereto as Exhibit D is a true and correct copy of the Florida Action.

50. minSURG International further alleges in the Florida Action that Frontier Devices is infringing U.S. Patent Nos. D603,502, titled "Surgical Impactor" ("the '502 patent"); D599,906, titled "Surgical Drill" ("the '906 patent"); D593,202, titled "Surgical Spatula" ("the '202 patent"); D590,943, titled "Surgical Bone Plug Inserter" ("the '943 patent"); D589,626, titled "Bone Plug Holder" ("the '626 patent"); and D574,495, titled "Drill Guide" ("the '495 patent") by making, offering for sale, selling, or using designs that embody the patented invention of each of the '502 patent, the '906 patent, the '202 patent, the '943 patent, the '626 patent and the '495 patent. Copies of the '502 patent, the '906 patent, the '202 patent, the '943 patent, the '626 patent and the '495 patent are included with the Florida Complaint, respectively.

51. The Fusio system does not infringe the '502 patent, the '906 patent, the '202 patent, the '943 patent, the '626 patent or the '495 patent. Accordingly, minSURG International has created an actual and justiciable controversy between itself and Frontier Devices with respect to whether Frontier Devices' Fusio system infringes one or more of the '502 patent, the '906 patent, the '202 patent, the '943 patent, the '626 patent and the '495 patent.

COUNT I

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. 7,708,761 B2

52. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-51 of this Complaint.

53. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1 *et. seq.* concerning Frontier Devices' non-infringement of the claims of the '761 patent.

54. Frontier Devices is entitled to a judicial declaration that it has not infringed and does not infringe, directly or indirectly, by inducement or by contribution, upon any valid, enforceable claim of the '761 patent.

COUNT II

DECLARATION OF INVALIDITY OF U.S. PATENT NO. 7,708,761 B2

55. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-54 of this Complaint.

56. There is an actual and justiciable controversy between the parties concerning the invalidity of the '761 patent asserted against Frontier Devices for failure to meet the requirements of the Patent Act, 35 U.S.C. § 1 *et. seq*., including, but not limited to, 35 U.S.C. §§ 101, 102, 103 and 112.

57. All of the claims of the '761 patent are invalid under 35 U.S.C. § 103(a) for being obvious in view of Stein Paper and one or more prior art references that teach the use of a "minimally invasive portal" to perform surgery, including surgery on facet joints.

58. All of the claims of the '761 patent are invalid under 35 U.S.C. §102 as being anticipated by one or more prior art references that teach the use of a "minimally invasive portal" to perform surgery, including surgery on facet joints.

59. Upon information and belief, all of the claims of the in the '761 patent are invalid under 35 U.S.C. §102 as the claimed subject matter of the '761 patent was in public use or sale in this country more than one year before the date of the application for the '761 patent.

60. All of the claims of the '761 are invalid under the prohibition against adding new matter under 35 U.S.C. § 112 because the claims are not supported by the disclosure in the original application.

61. Frontier Devices is entitled to a judicial declaration and order that the ‘761 patent is invalid.

COUNT III

DECLARATION OF UNENFORCEABILITY OF U.S. PATENT NO. 7,708,761 B2

62. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-61 of this Complaint.

63. There is an actual and justiciable controversy between the parties concerning the enforceability of the ‘761 patent asserted against Frontier Devices due to inequitable conduct during the prosecution of the ‘761 patent.

64. Upon information and belief, during the prosecution of the '720 application, Petersen, the named inventor of the '761 patent was aware of prior art references that disclose the use of a "minimally invasive portal" to perform surgery, including surgery on facet joints, as well as the use of those techniques in the United States prior to the invention of the subject matter of the '761 patent. These references and/or techniques, in combination with Stein Paper, render the '761 patent invalid. Nonetheless, Petersen failed to disclose such prior art references and known techniques to the Patent Office during the prosecution of the '720 application. Upon information and belief, Dr. Petersen's failure to disclose these references and techniques which include the use of a "minimally invasive portal" to surgery on facet joints to the Patent Office was meant to deceive the Patent Office into issuing the '761 patent.

65. Frontier Devices is entitled to a judicial declaration and order that the ‘761 patent is unenforceable.

COUNT IV

UNFAIR COMPETITION/FALSE ADVERTISING

66. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-65 of this Complaint.

67. minSURG has made and continues to make, in commercial advertising and promotion, representations of fact about its own products, and about the products of Frontier Devices, which were and continue to be false, deceptive and misleading

68. In particular, minSURG has embarked on a campaign of misinformation designed to deceive the purchasers and users of the Fusio system into believing that the Fusio system is, or would soon be, unavailable.

69. This campaign has included minSURG approaching Frontier Devices' customers and distributors and potential customers and potential distributors communicating falsely that minSURG would be the sole source for facet joint fusion allograft systems once minSURG was awarded a patent on its TruFUSE system.

70. This campaign included minSURG approaching Frontier Devices' potential customers and distributors and then-current distributors and customers and communicating falsely that they would be in violation of the patent to be awarded to minSURG on its TruFuse system.

71. This campaign includes the representatives of minSURG approaching doctors and hospitals, who are established customers of Frontier Devices, and falsely representing to these customers that minSURG had filed litigation and obtained an "injunction" against Frontier Devices when no such litigation or injunction existed. minSURG's agents further falsely represented to these Frontier Devices customers that, as a result of the injunction, the Fusio system would soon be completely unavailable. Upon information and belief, minSURG made these false statements in order to convince Frontier Devices' customers that minSURG is the sole legitimate source for facet fusion systems like the Fusio system and the TruFUSE system.

72. minSURG is also directing a similar campaign against Frontier Devices' distributors, sending them letters accusing them of infringement of the '761 patent and threatening them with suit. The letters omit any mention of the minimally invasive, arthroscopic portal-type limitations in the '761 patent. Indeed, the letters falsely indicate that the use of a facet fusion plug and drill guide even in an open procedure violate the '761 patent. Thus, the letters being sent by minSURG grossly overstate the scope of the '761 patent. Upon information and belief, the intent of this campaign is to deceive Frontier Devices' distributors into believing that the scope of the '761 is sufficiently broad to preclude distribution and use of the Fusio system.

73. Such misrepresentations are material, and have either deceived, or had the capacity to deceive, and continue to deceive, a substantial segment of customers and potential customers.

74. The products at issue have been sold, and continue to be sold, in interstate commerce.

75. The aforementioned acts have violated the rights of Frontier Devices and caused damage in an amount to be determined at trial.

76. By its actions, minSURG has irreparably injured the interest of Frontier Devices, and such irreparable injury will continue unless minSURG is enjoined by this Court from further violation of Frontier Devices' rights, for which its has no adequate remedy at law.

COUNT V

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. D603,502

77. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-76 of this Complaint.

78. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1 *et. seq*. concerning Frontier Devices' non-infringement of the claims of the '502 patent.

79. Frontier Devices is entitled to a judicial declaration that it has not infringed and does not infringe, directly or indirectly, upon any valid, enforceable claim of the ‘502 patent.

COUNT VI

DECLARATION OF INVALIDITY OF U.S. PATENT NO. D603,502

80. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-79 of this Complaint.

81. There is an actual and justiciable controversy between the parties concerning the invalidity of the ‘502 patent for failure to meet the requirements of the Patent Act, 35 U.S.C. § 1 *et. seq*., including, but not limited to, 35 U.S.C. §§ 102, 103, and 171.

82. The '502 patent depicts a primarily functional design for a surgical impactor and is therefore invalid under 35. U.S.C. § 171.

83. Upon information and belief, the surgical impactor depicted in the '502 patent is invalid under 35 U.S.C. § 102 since it was in public use or sale in this country more than one year before the date of the application for the '502 patent.

84. Upon information and belief, the surgical impactor depicted in the '502 patent is invalid under 35 U.S.C. § 103 as being obvious since the differences between the surgical impactor and the prior art are such that the surgical impactor

as a whole would have been obvious at the time the surgical impactor was made to a person having ordinary skill in the art.

85. Frontier Devices is entitled to a judicial declaration and order that the '502 patent is invalid.

COUNT VII

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. D599,906

86. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-85 of this Complaint.

87. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1 *et. seq*. concerning Frontier Devices' non-infringement of the claims of the '906 patent.

88. Frontier Devices is entitled to a judicial declaration that it has not infringed and does not infringe, directly or indirectly, upon any valid, enforceable claim of the '906 patent.

COUNT VIII

DECLARATION OF INVALIDITY OF U.S. PATENT NO. D599,906

89. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-88 of this Complaint.

90. There is an actual and justiciable controversy between the parties concerning the invalidity of the '906 patent for failure to meet the requirements of

the Patent Act, 35 U.S.C. § 1 *et. seq*., including, but not limited to, 35 U.S.C. §§ 102, 103 and 171.

91. The '906 patent depicts a primarily functional design for a surgical drill and is therefore invalid under 35. U.S.C. § 171.

92. Upon information and belief, the surgical drill depicted in the '906 patent is invalid under 35 U.S.C. § 102 since it was in public use or sale in this country more than one year before the date of the application for the '906 patent.

93. Upon information and belief, the surgical drill depicted in the '906 patent is invalid under 35 U.S.C. § 103 as being obvious since the differences between the surgical drill and the prior art are such that the surgical drill as a whole would have been obvious at the time the surgical drill was made to a person having ordinary skill in the art.

94. Frontier Devices is entitled to a judicial declaration and order that the '906 patent is invalid.

COUNT IX

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. D593,202

95. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-94 of this Complaint.

96. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1 *et. seq*. concerning Frontier Devices' non-infringement of the claims of the '202 patent.

97. Frontier Devices is entitled to a judicial declaration that it has not infringed and does not infringe, directly or indirectly, upon any valid, enforceable claim of the '202 patent.

COUNT X

DECLARATION OF INVALIDITY OF U.S. PATENT NO. D593,202

98. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-97 of this Complaint.

99. There is an actual and justiciable controversy between the parties concerning the invalidity of the '202 patent for failure to meet the requirements of the Patent Act, 35 U.S.C. § 1 *et. seq*., including, but not limited to, 35 U.S.C. §§ 102, 103 and 171.

100. The '202 patent depicts a primarily functional design for a surgical spatula and is therefore invalid under 35. U.S.C. § 171.

101. Upon information and belief, the surgical spatula depicted in the '202 patent is invalid under 35 U.S.C. § 102 since it was in public use or sale in this country more than one year before the date of the application for the '202 patent.

102. Upon information and belief, the surgical spatula depicted in the '202 patent is invalid under 35 U.S.C. § 103 as being obvious since the differences between the surgical spatula and the prior art are such that the surgical spatula as a whole would have been obvious at the time the surgical spatula was made to a person having ordinary skill in the art.

103. Frontier Devices is entitled to a judicial declaration and order that the '202 patent is invalid.

COUNT XI

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. D590,943

104. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-103 of this Complaint.

105. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1 *et. seq*. concerning Frontier Devices' non-infringement of the claims of the '943 patent.

106. Frontier Devices is entitled to a judicial declaration that it has not infringed and does not infringe, directly or indirectly, upon any valid, enforceable claim of the '943 patent.

COUNT XII

DECLARATION OF INVALIDITY OF U.S. PATENT NO. D590,943

107. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-106 of this Complaint.

108. There is an actual and justiciable controversy between the parties concerning the invalidity of the '943 patent for failure to meet the requirements of the Patent Act, 35 U.S.C. § 1 *et. seq*., including, but not limited to, 35 U.S.C. §§ 102, 103 and 171.

109. The '943 patent depicts a primarily functional design for a surgical bone plug inserter and is therefore invalid under 35. U.S.C. § 171.

110. Upon information and belief, the surgical bone plug inserter depicted in the '943 patent is invalid under 35 U.S.C. § 102 since it was in public use or sale in this country more than one year before the date of the application for the '943 patent.

111. Upon information and belief, the surgical bone plug inserter depicted in the '943 patent is invalid under 35 U.S.C. § 103 as being obvious since the differences between the surgical bone plug inserter and the prior art are such that the surgical bone plug inserter as a whole would have been obvious at the time the surgical bone inserter was made to a person having ordinary skill in the art.

112. Frontier Devices is entitled to a judicial declaration and order that the '943 patent is invalid.

COUNT XIII

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. D589,626

113. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-112 of this Complaint.

114. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1 *et. seq*. concerning Frontier Devices' non-infringement of the claims of the '626 patent.

115. Frontier Devices is entitled to a judicial declaration that it has not infringed and does not infringe, directly or indirectly, upon any valid, enforceable claim of the '626 patent.

COUNT IV

DECLARATION OF INVALIDITY OF U.S. PATENT NO. D589,626

116. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-115 of this Complaint.

117. There is an actual and justiciable controversy between the parties concerning the invalidity of the '626 patent for failure to meet the requirements of

the Patent Act, 35 U.S.C. § 1 *et. seq*., including, but not limited to, 35 U.S.C. §§ 102, 103 and 171.

118. The '626 patent depicts a primarily functional design for a bone plug holder and is therefore invalid under 35. U.S.C. § 171.

119. Upon information and belief, the bone plug holder depicted in the '626 patent is invalid under 35 U.S.C. §102 since it was in public use or sale in this country more than one year before the date of the application for the '626 patent.

120. Upon information and belief, the bone plug holder depicted in the '626 patent is invalid under 35 U.S.C. §103 as being obvious since the differences between the bone plug holder and the prior art are such that the bone plug holder as a whole would have been obvious at the time the bone plug inserter was made to a person having ordinary skill in the art.

121. Frontier Devices is entitled to a judicial declaration and order that the ‘626 patent is invalid.

COUNT XV

DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. D574,495

122. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-121 of this Complaint.

123. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1 *et. seq*. concerning Frontier Devices' non-infringement of the claims of the '495 patent.

124. Frontier Devices is entitled to a judicial declaration that it has not infringed and does not infringe, directly or indirectly, upon any valid, enforceable claim of the '495 patent.

COUNT XVI

DECLARATION OF INVALIDITY OF U.S. PATENT NO. D574,495

125. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph the averments of paragraphs 1-124 of this Complaint.

126. There is an actual and justiciable controversy between the parties concerning the invalidity of the '495 patent for failure to meet the requirements of the Patent Act, 35 U.S.C. § 1 *et. seq*., including, but not limited to, 35 U.S.C. §§ 102, 103 and 171.

127. The '495 patent depicts a primarily functional design for a drill guide and is therefore invalid under 35. U.S.C. § 171.

128. Upon information and belief, the drill guide depicted in the '495 patent is invalid under 35 U.S.C. §102 since it was in public use or sale in this country more than one year before the date of the application for the '495 patent.

129. Upon information and belief, the drill guide depicted in the '495 patent is invalid under 35 U.S.C. § 103 as being obvious since the differences between the drill guide and the prior art are such that the drill guide as a whole would have been obvious at the time the drill guide was made to a person having ordinary skill in the art.

130. Frontier Devices is entitled to a judicial declaration and order that the ‘495 patent is invalid.

COUNT XVII

INTENTIONAL INTERFERENCE WITH BUSINESS AND CONTRACTUAL RELATIONS

131. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph that averments of paragraphs 1-130 of this Complaint.

132. Frontier Devices has had and continues to have existing business and contractual relationships with its customers, potential customers, distributors and potential distributors.

133. minSURG has, at all times relevant hereto, had knowledge of the business and contractual relationships between Frontier Devices and its customers, potential customers, distributors and potential distributors.

134. Despite that knowledge, minSURG has intentionally, knowingly, maliciously, unjustifiably, and unlawfully interfered with the business and

contractual relationships between Frontier Devices and its customers, potential customers, distributors and potential distributors.

135. As a proximate result of minSURG's reckless and/or intentional interference with these business/contractual relations, Frontier Devices has suffered and will continue to suffer damages.

COUNT XVIII

DEFAMATION

136. Frontier Devices incorporates herein and realleges as though fully set forth in this paragraph that averments of paragraphs 1-135 of this Complaint.

137. Upon information and belief, minSURG has disseminated false and defamatory statements regarding Frontier Devices and its products to third parties, including potential clients, customers, distributors and business partners of Frontier Devices.

138. Upon information and belief, the misrepresentations disseminated by minSURG have damaged Frontier Devices' reputation with those third parties, and have impacted its business.

139. minSURG's conduct has been malice, intentional, improper and without legal justification.

140. Frontier Devices has suffered substantial damages as a result of minSURG's tortuous conduct in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREAS, Plaintiff Frontier Devices prays that this Court grant the following relief and judgment:

A. A declaration and judgment that Frontier Devices has not infringed, induced the infringement, or contributed to the infringement of any valid claim of U.S. Patent Nos. 7,708,761; D603,502; D599,906; D593,202; D590,943; D589,626 and D574,495, either literally or under the doctrine of equivalents;

B. A declaration and judgment that every asserted claim of U.S. Patent Nos. 7,708,761; D603,502; D599,906; D593,202; D590,943; D589,626 and D574,495 is invalid;

C. A declaration and judgment that every asserted claim of U.S. Patent No. 7,708,761 is unenforceable due to inequitable conduct and/or patent misuse;

D. Preliminary and permanent injunctive relief barring Defendants and their officers, employees, agents, representatives, attorneys, and others acting on their behalf, from representing to anyone, either directly or indirectly, that Frontier Devices has infringed or is infringing U.S. Patent Nos. 7,708,761; D603,502; D599,906; D593,202; D590,943; D589,626 or D574,495;

E. Preliminary and permanent injunctive relief barring Defendants and their officers, employees, agents, representatives, attorneys, and others acting on their behalf, from making the false, deceptive or misleading representations of facts described above;

F. Preliminary and permanent injunctive relief barring Defendants and their officers, employees, agents, representatives, attorneys, and others acting on their behalf, from interfering with the business and contractual relations of Frontier Devices;

G. An award of compensatory damages, punitive damages, and Defendants' profits, plus costs and interest;

H. This action is declared exceptional under 35 U.S.C. § 285 and/or 35 U.S.C. § 1117, and judgment be entered awarding Frontier Devices its costs and reasonable attorneys' fees, and such other relief as may be appropriate; and

I. Such other relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Fed R. Civ. P. 38, Frontier Devices demands trial by jury of all issues so triable.

DATED: August 13, 2010

Respectfully submitted,

/s/ C. Brandon Browning
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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2010, I electronically served the foregoing Second Amended Complaint with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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