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U. S. DIST COURT
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

MEDTRONIC SOFAMOR DANEK, INC.,)

Plaintiff,)

v.)

GARY K. MICHELSON, MD, and)

KARLIN TECHNOLOGY, INC.,)

Defendants.)

Civil Action No. 01-2373 GV

GARY K. MICHELSON, M.D., and)

KARLIN TECHNOLOGY, INC.,)

a California corporation,)

Counterclaimants,)

v.)

MEDTRONIC SOFAMOR DANEK, INC.,)

an Indiana corporation,)

Counterdefendant.)

JURY TRIAL DEMANDED

GARY K. MICHELSON, M.D.,)

Third Party Plaintiff,)

v.)

SOFAMOR DANEK HOLDINGS, INC.,)

a Delaware Corporation,)

Third Party Defendant.)

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**COUNTERCLAIMS FOR DAMAGES, INJUNCTIVE RELIEF, SPECIFIC
PERFORMANCE AND DECLARATORY RELIEF, FOR PATENT INFRINGEMENT,
BREACH OF CONTRACT, CONVERSION, UNJUST ENRICHMENT, FRAUD,
MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION,
INTERFERENCE WITH CONTRACT AND VIOLATION OF
THE LANHAM, SHERMAN AND CLAYTON ACTS**

In accordance with Rule 13 of the Federal Rules of Civil Procedure, defendant, counterclaimant and third-party plaintiff Gary K. Michelson, M.D. ("Dr. Michelson") and defendant and counterclaimant Karlin Technology, Inc. ("Karlin") (collectively, "counterclaimants"), for their claims for relief against plaintiff and counterdefendant Medtronic Sofamor Danek, Inc. (formerly Sofamor Danek Group, Inc.) ("Medtronic"), allege as follows:

INTRODUCTION

1. Dr. Michelson is the named inventor of at least eighty-six issued patents in the United States and over one hundred fifty granted or pending foreign patents and applications, primarily covering inventions relating to spinal fixation, surgical implants, surgical instruments and surgical methods. His efforts and inventions have helped and continue to help make spinal surgery safer, more effective and less expensive. Some of Dr. Michelson's inventions are assigned to Karlin, a corporation formerly engaged in the design of medical devices and presently licensing various of Dr. Michelson's inventions.

2. This lawsuit arises out of Medtronic's infringement of patents and the theft of trade secrets and other intellectual property, which were conceived, developed and invented by Dr. Michelson, relating to certain medical devices used in, among other things, spinal surgery. In late 1993 and early 1994, Medtronic co-exclusively licensed from Karlin and purchased from Dr. Michelson certain intellectual property and made a variety of promises in return, including promises to exploit that intellectual property. However, even before entering into the contracts relating to those transactions (the "License Agreement" and the "Purchase Agreement," respectively, and, collectively, the "Agreements"), Medtronic was aware of and admitted the limited scope of the rights it acquired thereby. In addition, shortly after the execution of the Agreements, Medtronic began negotiating for and later obtained further rights to other Michelson technologies for consideration unrelated to the Agreements. Over the past four years, Medtronic and its wholly-owned subsidiary and alter ego, third party defendant Sofamor Danek Holdings, Inc. ("Holdings") (collectively, with Medtronic, the "Medtronic Parties") have negotiated at great length with Dr. Michelson for the acquisition of additional intellectual property and trade secrets of Dr. Michelson's. During the course of these negotiations, the Medtronic Parties repeatedly acknowledged that they did not own the intellectual property and trade secrets that were the subject of these negotiations. During these negotiations, the Medtronic Parties

initially wanted to acquire only selected items of Dr. Michelson's technology, but ultimately decided that they wanted to acquire Dr. Michelson's intellectual property and trade secrets through a global agreement. These negotiations culminated in an agreement pursuant to which the Medtronic Parties agreed in principle to pay Dr. Michelson \$40 million upon execution and minimum royalties in excess of \$145 million over the life of the patents.

3. In early 1999, during the course of the negotiations, Medtronic was acquired by its now parent company, medical device giant Medtronic, Inc. In July 2000 the parties agreed in person to the essential terms of a global deal. However, instead of executing the global agreement, which was in addition to other agreements whereby Medtronic was paying and would continue to pay Dr. Michelson millions of dollars for rights to other technology, the Medtronic Parties repudiated the terms of the deal previously agreed upon, refused to sign the global agreement and took the position that they already owned the rights to all of Dr. Michelson's existing intellectual property and trade secrets and all of Dr. Michelson's future intellectual property and trade secrets. Thus, even though the Medtronic Parties had extensively negotiated an agreement to pay Dr. Michelson in excess of \$185 million over the life of the patents -- and told Dr. Michelson that they had preliminary approval from Medtronic, Inc.'s executive committee to agree to such a deal and that they were prepared to go forward on that

basis -- they took the position that there was no need for such a global agreement since they already owned or had licensed "all" of Dr. Michelson's intellectual property rights.

4. At the same time, Medtronic also secretly commenced this action, asserting that, based on the 1993 License Agreement with Karlin and the 1994 Purchase Agreement with Dr. Michelson, it owned all of Dr. Michelson's intellectual property and seeking a declaration to that effect. Medtronic filed its preemptive action even though the License and Purchase Agreements contain a notice and cure provision and a dispute resolution provision that are conditions precedent to the filing of any lawsuit. Medtronic secretly prepared and filed its action in violation of these contractual provisions, while at the same time Medtronic was simultaneously arranging for Dr. Michelson to attend a meeting in Minnesota ostensibly to finalize the global agreement.

5. Because of the Medtronic Parties' position, asserted in this action and otherwise, that they effectively already have all of Dr. Michelson's intellectual property and trade secrets, Dr. Michelson is prevented from exploiting his many patents and other valuable intellectual property rights with other companies. At the same time, Medtronic is failing to fulfill its obligations to exploit the intellectual property that is the subject of the Agreements. As a consequence of the Medtronic Parties' conduct, members of the public in need of

medical treatment are being and will continue to be deprived of the benefits offered by most of Dr. Michelson's inventions.

6. After being served with Medtronic's summons and complaint, counterclaimants repeatedly demanded that Medtronic dismiss its action and proceed with the mandatory dispute resolution process. Medtronic refused. In the meantime, Medtronic continues to infringe Dr. Michelson's patents, intellectual property and trade secrets by exploiting the same without having a license to do so, as alleged in more detail herein. Because Medtronic has refused to dismiss this action, counterclaimants have been forced to file these counterclaims.

7. As set forth more fully below, Medtronic has breached the Agreements in several material ways. Among other things, Medtronic has:

(a) filed this action without providing notice to counterclaimants and their counsel and an opportunity to cure and, if those efforts failed, proceed with the dispute resolution process mandated by the Agreements -- all prior to filing any lawsuit;

(b) failed to pay proper royalties by, among other things, deducting alleged commissions on employee sales (even though the Agreements provide that only "commissions actually paid or credited to third parties" may be deducted), and failing to report or include in the royalty calculations all sales from all countries in which products were sold, sales of

implants ordered by prescription, and revenues from rentals of the technology (e.g., instrument sets) subject to the Agreements;

(c) effectively frustrated and delayed Karlin's and Dr. Michelson's rights to audit any royalty records -- much less the "complete records" required by the Agreements -- despite repeated requests for the audit and the records and even though Medtronic now admits that improper deductions have pervasively and methodically been made over the entire term of the Agreements;

(d) effectively made a business decision not to use "best efforts" to actively promote the sale of the threaded spinal implant technology covered by the License Agreement -- in violation of the specific "best efforts" clause in the License Agreement -- and instead actively developed and marketed threaded interbody spinal fusion implants that compete directly with the threaded spinal implant technology covered by the License Agreement;

(e) effectively made a business decision not to use "best efforts" to obtain regulatory approval and to actively promote the sale of the non-threaded spinal implant technology covered by the Purchase Agreement and instead actively developed and marketed devices and technologies that compete directly with the non-threaded spinal implant technology covered by the Purchase Agreement, thereby effectively warehousing Dr. Michelson's technology, so that Medtronic can continue to sell

other, older, higher-priced products, for which it is already the market leader;

(f) refused to return the threaded and non-threaded spinal implant technology covered by the Agreements, in violation of specific provisions in the Agreements that require their return as a consequence of, among other things, the failure to use "best efforts," thereby depriving counterclaimants of the ability to exploit those technologies, which include not just patent rights, but other intellectual property rights as well; and

(g) failed to give proper patent notice and failed to provide Dr. Michelson appropriate name recognition in violation of the License Agreement by not using Dr. Michelson's name to identify the threaded products that utilize Dr. Michelson's technology and by not identifying Dr. Michelson as the inventor on all literature, including but not limited to marketing and advertising literature, for the Threaded products that utilize Dr. Michelson's technology.

8. In addition to breaching the License Agreement and the Purchase Agreement, Medtronic has also infringed certain patents of Dr. Michelson, which are discussed in more detail below. Medtronic has also repeatedly misappropriated Dr. Michelson's intellectual property by, among other things, applying for patents in another individual's name after reviewing Dr. Michelson's technology pursuant to non-disclosure agreements or by creating products that are based on Dr. Michelson's

technology that was only shared with Medtronic pursuant to non-disclosure agreements. Medtronic continues to infringe Dr. Michelson's patents and to misappropriate and use his trade secrets and confidential information.

9. The Medtronic Parties also fraudulently induced Dr. Michelson to enter into a settlement agreement (the "Three-Party Agreement") between Dr. Michelson, Holdings (which is an entity that counterclaimants are informed and believe was set up to function as a repository for patent rights acquired by the operating entity, Medtronic), and a third party that licensed certain rights in cervical plate technology to Holdings. Among other things, Medtronic, through Holdings, agreed in the Three-Party Agreement to provide name recognition to Dr. Michelson on all literature relating to products covered by the agreement after certain patents issued and also agreed to pay Dr. Michelson a royalty of 3% of net sales of the covered products, instead of the 8% to which Dr. Michelson would otherwise have been entitled. The Medtronic Parties -- who had superior knowledge and special information regarding the market for such products and their own sales of such products and their future plans for such sales -- induced Dr. Michelson to agree to this substantially lower royalty rate by falsely representing that the market was limited and of minimal value. Medtronic claimed this made the cervical plate technology less valuable to it unless it was able to retain more profits from its sales. In fact, counterclaimants are informed and believe and thereon allege that Medtronic's sales of

cervical plate products at the time were already substantially higher than the false numbers and lowball projections the Medtronic parties provided to induce Dr. Michelson to agree to the lower royalty rate, and that the Medtronic Parties knew that they would in the future sell far more of such products for a longer period and reap much greater profits from such sales than they represented. Had Dr. Michelson known the true facts, he would not have entered into the Three-Party Agreement and agreed thereby to a reduction in his royalty rate from 8% to 3%. Moreover, in violation of the Three-Party Agreement, the Medtronic Parties did not mark the licensed products and literature with the proper patent numbers or provide Dr. Michelson with appropriate name recognition on the products and literature (even after receiving notice to do so under the Three-Party Agreement) and improperly deducted purported internal sales costs of Medtronic employees from royalty payments (calculated at the lower, fraudulently induced 3% rate) even though the Three-Party Agreement only allows deduction of "sales commissions actually given." Because these breaches occurred at the very outset of the agreement, it appears that at the time Medtronic, through Holdings, entered into the Three-Party Agreement, the Medtronic Parties had no intention of providing Dr. Michelson the patent markings and name recognition to which he was contractually entitled or of paying him the appropriate royalty. In further breach of the Three-Party Agreement, the Medtronic

Parties have effectively frustrated and delayed Dr. Michelson's repeated requests for an audit under that agreement.

JURISDICTION AND VENUE

10. Jurisdiction of this Court arises under the laws of the United States, 28 U.S.C. §§ 1331 (federal question) and 1338(a) and (b) (as a civil action arising under any act of Congress relating to patents). Jurisdiction also arises under 28 U.S.C. § 1332(a) (diversity), in that the amount in controversy exceeds \$75,000, exclusive of costs and interest, and the action is between citizens of different states. This Court also has supplemental jurisdiction over the counterclaimants' state law claims pursuant to 28 U.S.C. § 1367(a).

11. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and (c) and 1400(b).

12. Counterclaimants are informed and believe and thereon allege that Medtronic is directly advertising, importing, offering for sale, selling and shipping infringing products to and in this district and has a regular and established place of business in this district and is thereby purposefully availing itself of the privilege of conducting activities in this forum.

THE PARTIES

13. Dr. Michelson is now and at all times material hereto has been a citizen of the State of California.

14. Karlin is a corporation organized under the laws of the State of California with its principal place of business in Los Angeles County, California.

15. Holdings is a corporation organized under the laws of the state of Delaware with its home office and principal place of business at 1800 Pyramid Place, Memphis, Tennessee 38132.

16. Medtronic, formerly known as Sofamor Danek Group, Inc., is a corporation organized under the laws of the State of Indiana with its home office and principal place of business at 1800 Pyramid Place, Memphis, Tennessee 38132.

17. At all relevant times, Holdings has been a wholly owned subsidiary of Medtronic. Counterclaimants are informed and believe and thereon allege that Holdings was formed to function as a repository for patent rights acquired by Medtronic. Medtronic performed and performs the operational functions relating to such patent rights, including patent prosecution and enforcement, and product development, manufacture, marketing and sales. Counterclaimants are further informed and believe and thereon allege that nominal ownership of certain patent rights originally acquired by Medtronic pursuant to the License Agreement and/or the Purchase Agreement has been transferred to Medtronic.

18. At all relevant times, Medtronic and Holdings have had overlapping decision makers and Medtronic has been Holdings' sole shareholder. Medtronic had complete dominion and control over Holdings and exercised this dominion and control such that Holdings was and is a mere conduit for and instrumentality of Medtronic's business.

19. In 1999, Medtronic merged with a subsidiary of the multi-national multi-billion dollar medical device company Medtronic, Inc. and became a wholly-owned subsidiary of Medtronic, Inc. The complete dominion and control and unity of purpose between Medtronic and Holdings continued and is continuing. At all relevant times, Medtronic and Holdings, located at the same offices in Memphis, Tennessee, have been operated and are continuing to operate as a single entity. There exists, and has existed, a unity of interest and ownership between Medtronic and Holdings such that any individuality and separateness between Medtronic and Holdings has ceased, and Holdings is the alter ego of Medtronic. In their dealings with the counterclaimants, the Medtronic Parties have made no practical distinction between Medtronic and Holdings. Adherence to the fiction of separate existence would permit an abuse of the corporate privilege and would work an injustice against Dr. Michelson and Karlin.

FACTS COMMON TO ALL COUNTERCLAIMS FOR RELIEF

Through The License Agreement And The Purchase Agreement, Counterclaimants Convey To Medtronic Rights To Two Specific Types Of Dr. Michelson's Inventions

20. As noted above, Dr. Michelson is the named inventor of at least eighty-six issued patents in the United States and over one hundred fifty granted or pending foreign patents and applications, covering inventions relating to spinal

fixation, surgical implants, surgical instruments and surgical methods.

21. In 1993, Dr. Michelson's many inventions included two specific types of interbody spinal implants known as the "Threaded Spinal Implants" and the "Non-Threaded Spinal Implants." Prior to December 31, 1993, Karlin owned the rights to the then-existent Threaded Spinal Implants and related instruments and methods for their insertion (collectively, the "Threaded Spinal Implant Technology"), and Dr. Michelson owned the rights to the then-existent Non-Threaded Spinal Implants and related instruments and methods for their insertion (collectively, the "Non-Threaded Spinal Implant Technology"). As of December 31, 1993, patents had issued and various additional patent applications were pending as to both the Threaded Spinal Implant Technology and the Non-Threaded Spinal Implant Technology. In addition, Dr. Michelson had developed prototypes of other devices and instruments that related to the Threaded and Non-Threaded Spinal Implant Technology for which patent applications had not yet been filed (the "Future Technology").

22. In 1993, Medtronic was in the business of researching, designing, developing and marketing medical devices used in connection with orthopedic and spinal surgery. Effective December 31, 1993, Medtronic and Karlin entered into the License Agreement, which granted Medtronic a license to use, make and sell, and an option to purchase, the Threaded Spinal Implant Technology and the Future Technology, specifically as defined in

the License Agreement. The License Agreement has, among others, the following key provisions:

(a) a specific "best efforts" provision, which requires Medtronic to use its best efforts "to obtain regulatory approval and to actively promote the sale of the [Threaded Spinal Implant Technology]," and, if Medtronic makes a business decision not to use its best efforts, entitles Karlin to terminate Medtronic's license or buy back from Medtronic the licensed or assigned rights;

(b) a provision that requires Medtronic to pay Karlin a royalty of ten percent of Net Sales of the Threaded Spinal Implant Technology;

(c) a clause that allows Karlin to audit Medtronic's records to verify Medtronic's compliance with the License Agreement;

(d) a requirement that Medtronic give proper patent notice and use Dr. Michelson's name to identify the threaded products that utilize Dr. Michelson's technology and identify Dr. Michelson as the inventor on all literature, including but not limited to marketing and advertising literature, for the threaded products that utilize Dr. Michelson's technology; and

(e) a notice and cure provision that requires formal notice to counsel of any alleged breach of the Agreement and a 30-day opportunity to cure any such alleged breach and, if those procedures are not successful, a provision requiring

mandatory dispute resolution (Dr. Michelson and the appropriate officer of Medtronic must "personally meet at a mutually agreeable location in an effort to resolve the dispute"), prior to the institution of any legal proceeding.

23. Effective January 11, 1994, Medtronic and Dr. Michelson entered into the Purchase Agreement, which transferred to Medtronic Dr. Michelson's rights to the Non-Threaded Spinal Implant Technology and Future Technology, specifically as defined in the Purchase Agreement. Like the License Agreement, the Purchase Agreement has, among others, the following key provisions:

(a) a specific "best efforts" provision, which requires Medtronic to use its best efforts "to obtain regulatory approval and to actively promote the sale" of the Non-Threaded Spinal Implant Technology, and, if Medtronic makes a business decision not to use its best efforts, entitles Dr. Michelson to buy back from Medtronic the transferred rights;

(b) a provision that requires Medtronic to pay Dr. Michelson a royalty of ten percent of Net Sales of the Non-Threaded Spinal Implant Technology;

(c) a clause that allows Dr. Michelson to audit Medtronic's records to verify Medtronic's compliance with the Purchase Agreement;

(d) a requirement that Medtronic use Dr. Michelson's name to identify the non-threaded products that utilize Dr. Michelson's technology and identify Dr. Michelson as

the inventor on all literature, including but not limited to marketing and advertising literature, for the non-threaded products that utilize Dr. Michelson's technology; and

(e) a notice and cure provision that requires formal notice to counsel of any alleged breach of the Agreement and a 30-day opportunity to cure any such alleged breach and, if those procedures are not successful, a provision requiring mandatory dispute resolution (Dr. Michelson and the appropriate officer of Medtronic must "personally meet at a mutually agreeable location in an effort to resolve the dispute"), prior to the institution of any legal proceeding.

24. Finally, in negotiating the License Agreement and the Purchase Agreement, the parties specifically agreed to exclude "continuations-in-part" from the definitions of the threaded and non-threaded Medical Devices. Thus, when it signed the Agreements, Medtronic specifically acknowledged that it would have no rights to inventions covered by "continuations-in-part" of Dr. Michelson's identified patents and patent applications -- i.e., rights to inventions and technologies not based wholly on matter disclosed in the specifications of the identified patents and patent application disclosures. In doing so, Medtronic acknowledged that its rights were limited to the then-existent Threaded Spinal Implants and related instruments and methods for their insertion, the then-existent Non-Threaded Spinal Implants and related instruments and methods for their insertion, and specific prototypes of other devices and instruments that related

to the Threaded and Non-Threaded Spinal Implant Technology which Dr. Michelson had developed and demonstrated to Medtronic, but for which patent applications had not yet been filed.

Medtronic Negotiates To Acquire Other Rights From

Dr. Michelson And Admits That It Has No

Rights To Dr. Michelson's Other Inventions

25. Within weeks after the execution of the License Agreement and the Purchase Agreement, Medtronic expressed an interest in obtaining rights to other of Dr. Michelson's interbody spinal fusion technology. The parties began negotiations relating to these inventions (the "New Inventions").

26. During those negotiations, Medtronic specifically and repeatedly acknowledged that it had no rights to the New Inventions pursuant to the License Agreement or the Purchase Agreement. For example, in March 1994, negotiations began over further technology that Dr. Michelson had developed relating to the use of staples with, and means for interconnecting, spinal implants, which implants included the technology licensed and sold to Medtronic. At no time did Medtronic assert that it already owned this staple technology pursuant to either the License Agreement or the Purchase Agreement. Indeed, Medtronic later acknowledged in a November 1999 agreement that Dr. Michelson owns the staple/spinal implant technology. Medtronic also created numerous other documents confirming and admitting that it did not own the New Inventions. During 1996 and 1997, Medtronic wanted to obtain rights to some of the New

Inventions via a purchase of Karlin from Dr. Michelson, but abandoned the idea. Medtronic and Dr. Michelson then began negotiating a deal pursuant to which Medtronic would gain access to at first three, then four, and finally six specific, functionally interrelated groups of patents and applications and the technology embodied therein. During these negotiations, Medtronic and its attorneys created numerous documents admitting and confirming that Medtronic did not own or have any rights to the New Inventions. One such example is a December 15, 1997 letter prepared by Medtronic's counsel. This letter attached three lists which distinguished "the patents and pending applications that are subject to the option to purchase included in the current License Agreement" from "all other patents and patent applications that will be assigned to [Medtronic] pursuant to the new agreement" being negotiated by the parties. As confirmed by this letter, Medtronic was seeking to purchase -- and simultaneously acknowledged that it did not own -- new Michelson technology relating to interbody spinal fusion implants for threaded and non-threaded implants, which technology was not covered by the License Agreement or the Purchase Agreement. Indeed, in his letter, Medtronic's counsel went on to note that "[w]e want to make sure that the assignment of patents and applications to [Medtronic] is made recognizing whether an asset is being acquired pursuant to the purchase option under the existing agreement or pursuant to the new agreement."

27. Over the course of the next several years, the parties exchanged drafts of a "global asset purchase agreement" that continued to distinguish between the New Inventions and the rights Medtronic had already acquired pursuant to the License Agreement and the Purchase Agreement. The drafts, accompanying documents and detailed negotiations made it abundantly clear that Medtronic wanted to acquire rights to Dr. Michelson's New Inventions which included, among other things, threaded and non-threaded implants not covered by either the License Agreement or the Purchase Agreement. A February 19, 1999 draft prepared by the Medtronic Parties recited that "[p]ursuant to an earlier Purchase Agreement with [Dr.] Michelson, [Holdings] owns certain Michelson patent and technology rights related to non-threaded interbody implants, and pursuant to a License Agreement with Karlin, [Holdings] is exclusively licensed under certain Karlin patent and technology rights related to threaded interbody implants [and Holdings] desires to acquire all right, title and interest in the [counterclaimants'] existing portfolio of patents, patent applications and technology related to interbody implants, and to acquire ownership of all [Dr.] Michelson's future inventions, patent and technology related to interbody implants" (emphasis added).

**The Medtronic Parties Induce Michelson To Enter Into
The Three-Party Agreement By Promising To
Pay Proper Royalties And Give Name Recognition**

28. While the global negotiations with the Medtronic Parties were ongoing, Dr. Michelson was involved in a dispute with Wright Medical Technology, Inc. ("Wright"), which also involved Medtronic because Medtronic had misappropriated certain technology of Dr. Michelson relating to devices known as cervical plates. Pursuant to one of the Confidentiality Agreements, Dr. Michelson disclosed to Medtronic the prototype invention and demonstrated and explained the technology of an anterior cervical plating system relating to vertebrae fusion known as the MultiLock Technology. After studying the MultiLock Technology for months, Medtronic copied the device with insubstantial changes in an attempt to make it appear as if its device was different from Dr. Michelson's. In the meantime, Wright purchased the MultiLock Technology from Dr. Michelson and agreed, among other things, to grant no licenses or otherwise hypothecate the patents, as they were collateral for Wright's performance, and to pay Dr. Michelson an 8% royalty on all sales of MultiLock products.

29. After Dr. Michelson learned of Medtronic's infringing device, he attempted to facilitate an all around solution to the problem by suggesting that Medtronic purchase the technology, i.e., step into Wright's shoes pursuant to his agreement with Wright. Instead, Medtronic negotiated a contract

with Wright giving Medtronic a prohibited license in exchange for an up-front fee paid to Wright and future royalty payments to Wright of only 3% (the "Danek License Agreement"). Wright's continuing breaches of its agreement with Dr. Michelson resulted in litigation between Dr. Michelson and Wright.

30. On January 18, 2001, Dr. Michelson, Wright and Medtronic, through Holdings, entered into the Three-Party Agreement, which among other things transferred to Dr. Michelson the right to royalty payments under the Danek License Agreement. The Three-Party Agreement amended the Danek License Agreement and allowed Medtronic, through Holdings, to continue as a licensee of the MultiLock Technology so long as it, among other things, made the royalty payments to Dr. Michelson on net sales of MultiLock products -- at a rate of 3%, not the 8% which Dr. Michelson would otherwise have been entitled to from Wright -- and marked Dr. Michelson's patent numbers on the Medtronic Parties' MultiLock products and literature and gave Dr. Michelson appropriate recognition by the placement of his name on the products and literature, along with a legend on the literature stating that the products were licensed under Dr. Michelson patents. The Medtronic Parties induced Dr. Michelson to agree to the substantially lower 3% royalty rate by misrepresenting the value of and market for the cervical plate technology. In particular, the Medtronic Parties provided Dr. Michelson with projections of future sales of cervical plate products projecting that the products would have only a five-year life in the market and would

generate at most \$30 million in revenues per year. The Medtronic Parties -- who had superior knowledge and special information regarding the market for such products as a result of Medtronic's position as a preeminent manufacturer and seller of spinal implant technology and its own sales of such products -- represented that this supposedly limited market for the cervical plate products had little value to them without additional financial incentive in the form of a higher profit margin. Counterclaimants are informed and believe and thereon allege that at the time, the Medtronic Parties knew that Medtronic was already selling substantially more cervical plate products than shown in the false numbers and projections the Medtronic Parties provided to Dr. Michelson, and that the Medtronic Parties knew that the market for such products was not limited to five years or to \$30 million per year and that they had plans to and would in the future sell far more products for a far longer period of time, and reap far greater profits from sales of such products, than they represented to Dr. Michelson.

**Medtronic Misappropriates Trade Secrets And Infringes The
Patents On The Counterclaimants' New Inventions**

31. During the parties' negotiations and pursuant to several non-disclosure and/or confidentiality agreements entered into over the past several years, including a February 3, 1998 Confidentiality Agreement (collectively the non-disclosure and confidentiality agreements are referred to as the "Confidentiality Agreements"), Dr. Michelson disclosed to

Medtronic a variety of confidential, proprietary and trade secret information relating to many of the non-patented New Inventions, which the Confidentiality Agreements provided were "to be used solely for the purpose of the . . . evaluation" of that information. Thereafter, Medtronic had its intellectual property attorneys create a detailed, 17-page spreadsheet listing virtually all of the New Inventions, which it entitled "Technology of Dr. Gary K. Michelson Being Offered To Medtronic, Inc." Each page of that spreadsheet contained the following footer: "Subject to confidentiality and nondisclosure agreement dated February 3, 1998. Contains technology of Dr. Gary K. Michelson." As late as 2000, Medtronic continued to sign Confidentiality Agreements, never contending that it owned the inventions and technology disclosed pursuant thereto. In violation of the Confidentiality Agreements, which provide that Medtronic "shall not, without the prior written authorization of the Disclosing Party, use, disclose or make available to any third party" any information relating to the New Inventions, and in violation of federal law, Medtronic took some of the New Inventions, filed its own patent applications and received patents naming other individuals as the inventors of those New Inventions, filed patent applications and received patents in the names of other inventors for inventions derived from technology disclosed by Dr. Michelson pursuant to the Confidentiality Agreements, and made other unauthorized commercial use of Dr. Michelson's New Inventions.

**After Years of Negotiation,
Medtronic Files a Preemptive Lawsuit
and Breaks Off Negotiation**

32. In late 1998, during the negotiations of the global agreement, the parties came close to finalizing a deal that had been the subject of lengthy negotiations. Around the same time, Medtronic (at the time known as Sofamor Danek Group, Inc.) was acquired by Medtronic, Inc., one of the world's largest manufacturers and sellers of medical devices and technology. The takeover was completed in early 1999. Medtronic informed counterclaimants and their counsel that Medtronic would be tied up for awhile and would need board approval from Medtronic's parent company, Medtronic, Inc., for the global agreement because it was over \$5 million. At that time, as a result of the Medtronic, Inc. acquisition, the parties' negotiation of a global agreement paused briefly, but then resumed a few months later. In July 2000, the parties reached an agreement on all substantive issues and agreed in principle to a deal pursuant to which Medtronic would pay to Dr. Michelson \$40 million upon the signing and a minimum cumulative total of not less than \$185 million. However, based on Medtronic's own sales projections as described to Dr. Michelson, it was anticipated that the royalties actually paid to him would greatly exceed these amounts and could be well in excess of \$500 million. Counterclaimants were told that the executive committee of Medtronic, Inc. had given a general approval of the known parameters of the agreement for Medtronic's

officers to negotiate within. The parties left a July 2000 meeting with the mutual understanding that they had an agreement in principle and their counsel were going to put it into writing.

33. In April 2001, Medtronic invited Dr. Michelson to a meeting in Minneapolis that was to take place on April 18, 2001 purportedly so that Medtronic, Inc.'s senior executives could meet Dr. Michelson face to face before signing such a substantial deal, given its duration and the amount of money involved. On April 17, 2001, Dr. Michelson learned by chance alone that Medtronic had unilaterally cancelled that meeting.

34. Subsequently, a meeting was scheduled for May 14, 2001, and Dr. Michelson was informed that Medtronic would propose some minor changes to the deal. Unbeknownst to counterclaimants, Medtronic was simultaneously preparing, and on May 9, 2001, filed this action -- in breach of notice and cure and pre-litigation dispute resolution provisions contained in both the License Agreement and the Purchase Agreement. Counterclaimants were unaware of this filing until May 22, 2001, when Medtronic served the summons and its first amended complaint. In its pleading, Medtronic ignored the fact that the Medtronic Parties had spent years negotiating a global agreement pursuant to which they were to pay Dr. Michelson a minimum of \$185 million over the life of the patents and instead contended that they acquired the rights to all of Dr. Michelson's New Inventions (even though certain inventions extended far beyond interbody spinal fusion implant and even though some of the inventions were not even medical

devices) back in 1993 and 1994 when the parties entered into the License Agreement and the Purchase Agreement. The contention in this action and otherwise by the Medtronic Parties that they own all of Dr. Michelson's New Inventions -- which include not only patents, but also other intellectual property rights -- has had a chilling effect on Dr. Michelson's ability to exploit the New Inventions and effectively precludes his ability to ever license or sell them.

**The Medtronic Parties Are Depriving The
Counterclaimants Of Royalties**

35. Under the License Agreement and the Purchase Agreement, counterclaimants are entitled to ten percent of net sales of, respectively, both the Threaded Spinal Implant Technology and the Non-Threaded Spinal Implant Technology. One of the principal purposes of the License Agreement and the Purchase Agreement was to secure for the counterclaimants a future cash flow stream by requiring Medtronic to use its best efforts "to obtain regulatory approval and to actively promote the sale" of those technologies. Medtronic has effectively made a business decision to do exactly the opposite, and has deprived the counterclaimants of substantial royalties. With respect to the License Agreement, among other things, Medtronic has developed and marketed interbody spinal fusion implants that compete with the Threaded Spinal Implant Technology that was licensed under the License Agreement.

36. With respect to the Purchase Agreement, Medtronic has effectively eliminated the Non-Threaded Spinal Implant Technology by failing to initiate -- let alone complete -- a single Investigational Devices Exemption ("IDE"), a testing procedure that is the first step in obtaining U.S. Food & Drug Administration approval for certain types of medical devices, and by failing to take any effective steps at all to commercialize the technology outside the United States, where such regulatory approvals are not required. At the same time, Medtronic had completed applications for FDA approval for its own, competing products. Medtronic has also failed to actively promote sales of the Non-Threaded Spinal Implant Technology in the United States and has failed to do anything whatsoever to exploit that technology in Europe. Indeed, counter to the very notion of "best efforts," Medtronic has actively undermined sales of the cutting edge Non-Threaded Spinal Implant Technology by marketing and promoting its own competing products that are older and often higher-priced, but which it controls as the market leader. As a result of what is effectively a business decision not to use best efforts in connection with the Non-Threaded Spinal Implant Technology, Medtronic can and does make more money selling its own products, while it allows products based on the counterclaimants' newer, lower priced and superior technologies to languish on the shelf, to the detriment of medical patients. In addition, counterclaimants are informed and believe and thereon allege that Medtronic has recently dedicated substantial

resources to the development and marketing of other products, such as implants made out of bone, that compete directly with, and will take market share from, the Threaded Spinal Implant Technology and the Non-Threaded Spinal Implant Technology, which it had agreed to use its best efforts to develop and market.

37. To the extent that Medtronic has sold the Threaded Spinal Implant Technology, it has systematically underpaid royalties due the counterclaimants from such sales. The Medtronic Parties have also systematically underpaid royalties due Dr. Michelson from sales of the MultiLock Technology pursuant to the Three-Party Agreement. Among other things, the License Agreement's and the Purchase Agreement's definitions of "Net Sales," of which the counterclaimants are entitled to ten percent, only allow the Medtronic Parties to deduct "sales commissions" from gross sales revenues to the extent commissions are "actually paid" to third parties. The Three-Party Agreement similarly prohibits the Medtronic Parties from deducting sales commissions not actually paid to third parties. Notwithstanding this clear language, the Medtronic Parties have consistently understated net sales by, among other things, deducting from sales revenues for the Threaded Spinal Implant Technology and the MultiLock Technology nondeductible costs purportedly based on sales made by Medtronic employees that were never actually paid to any third parties. The Medtronic Parties have also underpaid and misreported royalties by, among other things, failing to report or include the royalty calculations of all sales from all

countries in which products were sold, sales of implants ordered by prescriptions, and revenues from rentals of the technology subject to the Agreements.

38. The License Agreement and the Purchase Agreement grant Karlin and Dr. Michelson, respectively, the right "to inspect, examine, audit and copy [Medtronic's] records . . . in order to verify [Medtronic's] compliance with the terms of this Agreement." The Three-Party Agreement grants Dr. Michelson similar rights. As a consequence of the Medtronic Parties' underpayment of royalties, among other things, the counterclaimants demanded access to the Medtronic Parties' records to conduct audits that will determine the full extent to which the Medtronic Parties have underpaid the counterclaimants under all three agreements. For months, the Medtronic Parties have effectively frustrated and delayed counterclaimants' requests for audits.

FIRST COUNTERCLAIM FOR RELIEF

(Patent Infringement)

39. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 38 above.

40. On August 25, 1998, United States Patent No. 5,797,909 entitled "Apparatus for Inserting Spinal Implants" duly and legally issued to Dr. Michelson as the sole named inventor. On June 27, 2000, United States Patent No. 6,080,155 entitled "Method of Inserting and Preloading Spinal Implants" duly and

legally issued to Dr. Michelson as the sole named inventor. On December 12, 2000 United States Patent No. 6,159,214 entitled "Milling Instrumentation and Method for Preparing a Space Between Adjacent Vertebral Bodies" duly and legally issued to Dr. Michelson as the sole named inventor. On April 3, 2001, United States Patent No. 6,210,412 entitled "Method for Inserting Frustoconical Interbody Spinal Fusion Implants" duly and legally issued to Dr. Michelson as the sole named inventor. On August 7, 2001, United States Patent No. 6,270,498 entitled "Apparatus for Inserting Spinal Implants" duly and legally issued to Dr. Michelson as the sole named inventor. These patents are collectively referred to as the "Patents."

41. At all times relevant hereto, Dr. Michelson was and is the owner of the Patents.

42. Pursuant to 35 U.S.C. § 282, the Patents are presumed valid.

43. The counterclaimants are informed and believe and thereon allege that Medtronic has been and is now infringing the Patents by manufacturing, selling, offering for sale and using products which incorporate the inventions claimed by the Patents.

44. The counterclaimants are informed and believe and thereon allege that Medtronic has actively induced and contributed to infringement of the Patents by doctors, patients and other end-users by advertising products that incorporate the inventions claimed by the Patents and by providing instructions

for the use of products in a manner that infringes the inventions claimed by the Patents.

45. Medtronic had prior actual knowledge of the existence of the Patents, and notwithstanding such knowledge has continued to infringe and actively induce and contribute to infringement of the Patents in willful disregard of the counterclaimants' patent rights.

46. Medtronic threatens to continue to engage in the acts complained of herein, and unless restrained and enjoined will continue to do so, all to counterclaimants' irreparable damage. It would be difficult to ascertain the amount of compensation which would afford the counterclaimants adequate relief for such future and continuing acts, and a multiplicity of judicial proceedings would be required. The counterclaimants do not have an adequate remedy at law to compensate them for injuries threatened.

47. Pursuant to 35 U.S.C. §§ 281 and 283, the counterclaimants are entitled to an order enjoining Medtronic from any further infringement of the Patents.

48. By reason of Medtronic's acts alleged herein, the counterclaimants have suffered damage in an amount to be proved at trial. Pursuant to 35 U.S.C. § 284, the counterclaimants are entitled to damages adequate to compensate for Medtronic's infringement of the Patents, and that the damages so ascertained be trebled and awarded to the counterclaimants, together with interest and costs.

49. Medtronic's infringement of the Patents and its inducing and contributing to infringement of the Patents was and is willful and deliberate thereby making this an exceptional case. Pursuant to 35 U.S.C. § 285, the counterclaimants are entitled to an order awarding the counterclaimants their attorneys' fees.

SECOND COUNTERCLAIM FOR RELIEF

(Breach of Written Contract -- License Agreement)

50. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 49 above.

51. As of December 31, 1993, Karlin entered into the License Agreement with Medtronic.

52. Pursuant to the License Agreement, Karlin granted Medtronic a license to use, make and sell the Threaded Spinal Implant Technology as defined and specified in that Agreement. In return, the License Agreement requires Medtronic to, among other things:

(a) Under Section 4.4 of the License Agreement, use its best efforts "to obtain regulatory approval and to actively promote the sale" of the Threaded Spinal Implant Technology;

(b) Pay Karlin a royalty of ten percent of net sales of the Threaded Spinal Implant Technology, based on a definition of net sales that allows deduction of "sales

commissions" from gross sales revenues only to the extent of any commissions "actually paid" to third parties;

(c) Allow Karlin to audit Medtronic's records to verify Medtronic's compliance with the License Agreement;

(d) Identify in all of Medtronic's literature related to the Threaded Spinal Implant Technology that that technology was developed by Dr. Michelson;

(e) Refrain from institution of any formal legal proceeding for any alleged breach of the License Agreement until after giving Karlin (and its counsel) appropriate notice and opportunity to cure the alleged breach; and

(f) Refrain from institution of any formal legal proceeding for any alleged breach of the License Agreement until after Dr. Michelson and the appropriate officer of Medtronic "personally meet at a mutually agreeable location in an effort to resolve the dispute."

53. Medtronic has breached the License Agreement by, among other things, some or all of the following conduct:

(a) In violation of Section 4.4 of the License Agreement, Medtronic has effectively made a business decision not to use its best efforts by actively promoting the sale of interbody spinal fusion implants that directly compete with the Threaded Spinal Implant Technology, and has refused to recognize Karlin's rights and honor Medtronic's obligations which arise from that conduct pursuant to Section 4.4;

(b) Medtronic has underpaid royalties due and owing to Karlin by understating net sales of Threaded Spinal Implant Technology through the improper deduction from gross sales revenues of fabricated employee sales costs that were never actually paid to any third party;

(c) For months, Medtronic failed and refused to allow access to its records for the purpose of an audit to determine its compliance with the License Agreement, despite proper demand therefor, and effectively frustrated and delayed Karlin's right to obtain an audit under the License Agreement;

(d) Medtronic has failed to give proper patent notice and appropriate name recognition in marking of the products based on Dr. Michelson's technology and in its literature, including but not limited to, its advertising and marketing;

(e) Medtronic filed suit against Karlin without giving proper notice and an opportunity to cure any alleged breach;

(f) Medtronic provided no notice and no opportunity to cure and then filed suit against Karlin without following the pre-litigation dispute resolution procedure requiring that Dr. Michelson and the appropriate officer of Medtronic personally meet to resolve the dispute; and/or

(g) Medtronic has breached the implied covenant of good faith and fair dealing in the License Agreement.

54. Karlin has duly performed all of the conditions of the License Agreement, other than those conditions which have been waived by Medtronic or excused by its breaches of the License Agreement.

55. As a direct and proximate result of Medtronic's breaches of the License Agreement, Karlin has sustained damages in an amount to be proven at trial, but in no event less than \$75,000.

THIRD COUNTERCLAIM FOR RELIEF

(Patent Infringement -- Threaded Spinal Implants)

56. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 55 above.

57. At least the following patents were licensed to Medtronic pursuant to the License Agreement: United States Patent Nos. 5,015,247 ("the '247 patent") and 6,149,650 ("the '650 patent"). Pursuant to 35 U.S.C. § 282, the '247 and '650 patents are presumed valid.

58. Medtronic manufactures, uses, sells, and offers to sell threaded spinal implants that incorporate the inventions claimed in the '247 and '650 patents.

59. In June 2001, Karlin exercised its rights under Section 4.4 of the License Agreement, and sought to purchase from Medtronic all rights to, among other things, the '247 and '650 patents.

60. The counterclaimants are informed and believe and thereon allege that despite Karlin's valid exercise of its rights under Section 4.4 of the License Agreement, Medtronic has continued to manufacture, use, offer to sell, and sell threaded spinal implants that incorporate the inventions claimed in the '247 and '650 patents.

61. The counterclaimants are informed and believe and thereon allege that Medtronic's continued manufacturing, using, offering to sell, and selling of threaded spinal implants that incorporate the inventions claimed in the '247 and '650 patents constitutes infringement of those patents.

62. The counterclaimants are informed and believe and thereon allege that Medtronic has actively induced and contributed to infringement of the '247 and '650 patents by doctors, patents and other end-users of threaded spinal implants.

63. By reason of Medtronic's acts alleged herein, Karlin has suffered damage in an amount to be proved at trial. Pursuant to 35 U.S.C. § 284, Karlin is entitled to damages adequate to compensate for Medtronic's infringement and induced and contributory infringement of the '247 and '650 patents, and that the damages so ascertained by trebled and awarded to Karlin, together with interests and costs.

64. Medtronic threatens to continue to engage in the acts complained of herein, and unless restrained and enjoined will continue to do so, all to Karlin's irreparable damage.

65. It would be difficult to ascertain the amount of compensation which would afford Karlin adequate relief for such future and continuing acts, and a multiplicity of judicial proceedings would be required. Karlin does not have an adequate remedy at law to compensate it for injuries threatened.

66. Therefore, pursuant to 35 U.S.C. §§ 281 and 283, Karlin is entitled to an order enjoining Medtronic from any further infringement of the '247 and '650 patents.

67. Medtronic's infringement and its inducing and contributing to infringement of the '247 and '650 patents was and is willful and deliberate thereby making this an exceptional case. Pursuant to 35 U.S.C. § 285, Karlin is entitled to an order awarding it attorneys' fees.

FOURTH COUNTERCLAIM FOR RELIEF

(Specific Performance -- License Agreement)

68. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 67 above.

69. Pursuant to the License Agreement, Karlin granted Medtronic a license to use, make and sell the Threaded Spinal Implant Technology. Medtronic's obligations under the License Agreement include its duties under Section 4.4 of the License Agreement, which requires Medtronic to, among other things, "use its best efforts to obtain regulatory approval and to actively promote the sale" of the Threaded Spinal Implant Technology. Section 4.4 of the License Agreement further provides that if

Medtronic's Board of Directors "makes the business decision not to use its best efforts in the United States or Europe to obtain regulatory approval and to actively promote the sale of the [Threaded Spinal Implant Technology] consistent with [Medtronic's] standards and in light of the then current market conditions, then [Karlin's] sole recourse shall be to have the option of terminating the license or purchasing from [Medtronic] all rights to the [Threaded Spinal Implant Technology] licensed or assigned to [Medtronic] in this Agreement and any regulatory filings related thereto for the United States and/or Europe, whichever is the subject of the Board's business decision referred to in this sentence for [specified monetary compensation] for the United States and/or [specified monetary compensation] for Europe as the case may be."

70. Medtronic has effectively made the business decision not to comply with its best efforts obligations under Section 4.4 of the License Agreement.

71. Karlin has exercised its rights under Section 4.4 of the License Agreement, is prepared to make payment to Medtronic of the monetary compensation specified by Section 4.4 of the License Agreement and has requested the wire instructions needed to make that payment, but Medtronic has failed and refused to recognize Karlin's rights under Section 4.4 of the License Agreement and honor Medtronic's obligations in connection therewith.

72. Karlin is entitled to a decree of specific performance directing Medtronic to recognize Karlin's rights under Section 4.4 of the License Agreement and honor Medtronic's obligations in connection therewith.

FIFTH COUNTERCLAIM FOR RELIEF

(Conversion --Threaded Spinal Implant Technology)

73. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 72 above.

74. At all times herein mentioned, Karlin did and does maintain a valid interest in the rights licensed to Medtronic pursuant to the License Agreement as a consequence of, among other things, Karlin's rights under Section 4.4 of the License Agreement.

75. Medtronic has failed and refused and continues to fail and refuse to honor its obligations under Section 4.4 of the License Agreement despite proper demand therefor and has instead wrongfully taken the rights licensed to Medtronic pursuant to the License Agreement and converted them to its own private use, benefit, and enjoyment, in disregard of Karlin's rights.

76. As a proximate result of Medtronic's wrongful conversion, Karlin has been deprived of the possession, use, benefit and enjoyment of the rights licensed to Medtronic pursuant to the License Agreement and the proceeds thereof, including the profits Karlin would otherwise have enjoyed from the exploitation of these rights, all to Karlin's damage in an

amount to be proven at trial, but in no event less than \$75,000. Karlin has been required to exert time and energy and to expend money in pursuit of the rights licensed to Medtronic pursuant to the License Agreement, all to Karlin's further damage.

77. In converting the rights licensed to Medtronic pursuant to the License Agreement, Medtronic's conduct was willful and was intended to cause injury to Karlin in that Medtronic acted with oppression, fraud and malice in misappropriating the rights licensed to Medtronic pursuant to the License Agreement to deprive Karlin of profits from the exploitation of those rights. Karlin is therefore entitled to recover punitive or exemplary damages in an amount to be determined at trial, according to proof.

SIXTH COUNTERCLAIM FOR RELIEF

(Unjust Enrichment --Threaded Spinal Implant Technology)

78. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 77 above.

79. As alleged above, Medtronic has failed and refused and continues to fail and refuse to honor its obligations under Section 4.4 of the License Agreement despite proper demand therefor. Medtronic has obtained and continues to obtain profits from the exploitation of rights licensed to it pursuant to the License Agreement and from the improper sale of interbody spinal fusion implants that compete with the Threaded Spinal Implant Technology.

80. Given the acts of Medtronic alleged above, including, among other things, its many and continuing breaches of contract, its deprivation of Karlin's right to exploit the rights licensed to Medtronic pursuant to the License Agreement, and its improper sales of interbody spinal fusion implants that compete with the Threaded Spinal Implant Technology, Medtronic's retention of such profits under such circumstances is inequitable and unjust.

81. Medtronic's inequitable and unjust enrichment has come at the expense of Karlin.

82. This injustice can be avoided only if Medtronic returns to Karlin any profits it obtained through the exploitation of the rights licensed to Medtronic pursuant to the License Agreement and through its improper sales of interbody spinal fusion implants that compete with the Threaded Spinal Implant Technology.

83. In order to determine the amount of Medtronic's unjust enrichment, an accounting of Medtronic's profits obtained through the exploitation of the rights licensed to Medtronic pursuant to the License Agreement and through its improper sales of interbody spinal fusion implants that compete with the Threaded Spinal Implant Technology is necessary.

SEVENTH COUNTERCLAIM FOR RELIEF

(Breach of Written Contract -- Purchase Agreement)

84. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 83 above.

85. As of January 11, 1994, Dr. Michelson entered into the Purchase Agreement with Medtronic.

86. Pursuant to the Purchase Agreement, Dr. Michelson transferred to Medtronic his rights to the Non-Threaded Spinal Implant Technology as defined and specified in that Agreement. In return, the Purchase Agreement requires Medtronic to, among other things:

(a) Under Section 4.5 of the Purchase Agreement, use its best efforts "to obtain regulatory approval and to actively promote the sale" of the Non-Threaded Spinal Implant Technology;

(b) Pay Dr. Michelson a commission of ten percent of net sales of the Non-Threaded Spinal Implant Technology, based on a definition of net sales that allows deduction of "sales commissions" from gross sales revenues only to the extent of any commissions "actually paid" to third parties;

(c) Allow Dr. Michelson to audit Medtronic's records to verify Medtronic's compliance with the Purchase Agreement;

(d) Identify in all of Medtronic's literature related to the Non-Threaded Spinal Implant Technology which the

Medtronic Parties claim rights in that that technology was developed by Dr. Michelson;

(e) Refrain from institution of any formal legal proceeding for any alleged breach of the Purchase Agreement until after giving Dr. Michelson (and his counsel) appropriate notice and opportunity to cure the alleged breach; and

(f) Refrain from institution of any formal legal proceeding for any alleged breach of the Purchase Agreement until after Dr. Michelson and the appropriate officer of Medtronic "personally meet at a mutually agreeable location in an effort to resolve the dispute."

87. Medtronic has breached the Purchase Agreement by, among other things, some or all of the following conduct:

(a) In violation of Section 4.5 of the Purchase Agreement, Medtronic has effectively made a business decision not to use its best efforts, has not obtained regulatory approval for the Non-Threaded Spinal Implant Technology, has not actively promoted the sale of the Non-Threaded Spinal Implant Technology, and has instead developed and marketed devices and technologies which compete with the Non-Threaded Spinal Implant Technology, and has refused to recognize Dr. Michelson's rights and honor Medtronic's obligations which arise from that conduct pursuant to Section 4.5;

(b) Medtronic filed suit against Dr. Michelson without giving proper notice and an opportunity to cure any alleged breach;

(c) Medtronic filed suit against Dr. Michelson without following the pre-litigation dispute resolution procedure requiring that Dr. Michelson and the appropriate officer of Medtronic personally meet to resolve the dispute; and/or

(d) Medtronic has breached the implied covenant of good faith and fair dealing in the Purchase Agreement.

88. Dr. Michelson has duly performed all of the conditions of the Purchase Agreement, other than those conditions which have been waived by Medtronic or excused by its breaches of the Purchase Agreement.

89. As a direct and proximate result of Medtronic's breaches of the Purchase Agreement, Dr. Michelson has sustained damages in an amount to be proven at trial, but in no event less than \$75,000.

EIGHTH COUNTERCLAIM FOR RELIEF

(Specific Performance -- Purchase Agreement)

90. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 89 above.

91. Pursuant to the Purchase Agreement, Dr. Michelson transferred to Medtronic his rights to the Non-Threaded Spinal Implant Technology. Medtronic's obligations under the Purchase Agreement include its duties under Section 4.5 of the Purchase Agreement, which requires Medtronic to, among other things, "use its best efforts to obtain regulatory approval and to actively promote the sale" of the Non-Threaded Spinal Implant Technology.

Section 4.5 of the Purchase Agreement further provides that if Medtronic's Board of Directors "makes the business decision not to use its best efforts in the United States or Europe to obtain regulatory approval and to actively promote the sale of the [Non-Threaded Spinal Implant Technology] consistent with [Medtronic's] standards and in light of the then current market conditions, then [Dr.] Michelson's sole recourse shall be to have the option of purchasing from [Medtronic] all rights to the [Non-Threaded Spinal Implant Technology] transferred or assigned to [Medtronic] in this Agreement and any regulatory filings related thereto for the United States and/or Europe, whichever is the subject of the Board's business decision referred to in this sentence, for [specified monetary compensation] for the United States and/or [specified monetary compensation] for Europe as the case may be."

92. Medtronic has effectively made the business decision not to comply with its best efforts obligations under Section 4.5 of the Purchase Agreement.

93. Dr. Michelson has exercised his rights under Section 4.5 of the Purchase Agreement, is prepared to make payment to Medtronic of monetary compensation specified by Section 4.5 of the Purchase Agreement and has requested the wire instructions needed to make that payment, but Medtronic has failed and refused to recognize Dr. Michelson's rights under Section 4.5 of the Purchase Agreement and honor Medtronic's obligations in connection therewith.

94. Dr. Michelson is entitled to a decree of specific performance directing Medtronic recognize Dr. Michelson's rights under Section 4.5 of the Purchase Agreement and honor Medtronic's obligations in connection therewith.

NINTH COUNTERCLAIM FOR RELIEF

(Conversion -- Non-Threaded Spinal Implant Technology)

95. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 94 above.

96. At all times herein mentioned, Dr. Michelson did and does maintain a valid interest in the rights transferred to Medtronic pursuant to the Purchase Agreement as a consequence of, among other things, Dr. Michelson's rights under Section 4.5 of the Purchase Agreement.

97. Medtronic has failed and refused and continues to fail and refuse to honor its obligations under Section 4.5 of the Purchase Agreement despite proper demand therefor and has instead wrongfully taken the rights transferred to Medtronic pursuant to the Purchase Agreement and converted them to its own private use, benefit, and enjoyment, in disregard of Dr. Michelson's rights.

98. As a proximate result of Medtronic's wrongful conversion, Dr. Michelson has been deprived of the possession, use, benefit and enjoyment of the rights transferred to Medtronic pursuant to the Purchase Agreement and the proceeds thereof, including the profits Dr. Michelson would otherwise have enjoyed from the exploitation of these rights, all to Dr. Michelson's

damage in an amount to be proven at trial, but in no event less than \$75,000. Dr. Michelson has been required to exert time and energy and to expend money in pursuit of the rights transferred to Medtronic pursuant to the Purchase Agreement, all to Dr. Michelson's further damage.

99. In converting the rights transferred to Medtronic pursuant to the Purchase Agreement, Medtronic's conduct was willful and was intended to cause injury to Dr. Michelson in that Medtronic acted with oppression, fraud and malice in misappropriating the rights transferred to Medtronic pursuant to the Purchase Agreement to deprive Dr. Michelson of profits from the exploitation of those rights. Dr. Michelson is therefore entitled to recover punitive or exemplary damages in an amount to be determined at trial, according to proof.

TENTH COUNTERCLAIM FOR RELIEF

(Unjust Enrichment --Non-Threaded Spinal Implant Technology)

100. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 99 above.

101. As alleged above, Medtronic has failed and refused and continues to fail and refuse to honor its obligations under Section 4.5 of the Purchase Agreement despite proper demand therefor. Medtronic has obtained and continues to obtain profits from the improper sale of devices and technologies that compete with the Non-Threaded Spinal Implant Technology.

102. Given the acts of Medtronic alleged above, including, among other things, its many and continuing breaches of contract, its deprivation of Dr. Michelson's right to exploit the rights transferred to Medtronic pursuant to the Purchase Agreement and its improper sales of devices and technologies that compete with the Non-Threaded Spinal Implant Technology, Medtronic's retention of such profits under such circumstances is inequitable and unjust.

103. Medtronic's inequitable and unjust enrichment has come at the expense of Dr. Michelson.

104. This injustice can be avoided only if Medtronic returns to Dr. Michelson any profits it obtained through the exploitation of the rights transferred to Medtronic pursuant to the Purchase Agreement and through its improper sales of devices and technologies that compete with the Non-Threaded Spinal Implant Technology.

105. In order to determine the amount of Medtronic's unjust enrichment, an accounting of Medtronic's profits obtained through any exploitation of the rights transferred to Medtronic pursuant to the Purchase Agreement and through its improper sales of devices and technologies that compete with the Non-Threaded Spinal Implant Technology is necessary.

ELEVENTH COUNTERCLAIM FOR RELIEF

(Breach of Written Contract -- Three-Party Agreement)

106. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 105 above.

107. On or about January 18, 2001, Dr. Michelson, Medtronic, through Holdings, and Wright entered into the Three-Party Agreement.

108. Pursuant to the Three-Party Agreement, Dr. Michelson allowed Medtronic, through Holdings, to remain a licensee of and to make, use and sell the MultiLock products (as defined in the Three-Party Agreement). In return, the Three-Party Agreement requires the Medtronic Parties to, among other things:

(a) Pay Dr. Michelson a royalty on net sales of such MultiLock products, based on a definition of net sales that allows deduction of "sales commissions" from gross sales revenues only to the extent of any commissions "actually paid";

(b) Allow Dr. Michelson to audit the Medtronic Parties' records to verify their compliance with the Three-Party Agreement; and

(c) Mark all MultiLock products and literature with the appropriate numbers of the patents licensed to the Medtronic Parties, and give Dr. Michelson name recognition by placing his name on the Medtronic Parties' MultiLock products and literature and placing on the literature the legend "Licensed

under one or more of G. Karlin Michelson, M.D. Patent Nos.

_____."

109. The Medtronic Parties have breached the Three-Party Agreement by, among other things, some or all of the following conduct:

(a) The Medtronic Parties have underpaid royalties due and owing to Dr. Michelson by understating net sales of MultiLock Technology through the improper deduction from gross sales revenues of fabricated employee sales costs that were never actually paid to any third party;

(b) For months, the Medtronic Parties failed and refused to allow access to their records for the purpose of an audit to determine their compliance with the Three-Party Agreement, despite proper demand therefor, and effectively frustrated and delayed Dr. Michelson's right to obtain an audit under the Three-Party Agreement;

(c) The Medtronic Parties have failed and refused to mark their MultiLock products and literature with the proper patent numbers or to give appropriate name recognition on their products and literature to Dr. Michelson; and

(d) The Medtronic Parties have breached the implied covenant of good faith and fair dealing in the Three-Party Agreement.

110. Dr. Michelson has duly performed all of the conditions of the Three-Party Agreement, other than those

conditions which have been waived by the Medtronic Parties or excused by their breaches of the Three-Party Agreement.

111. As a direct and proximate result of the Medtronic Parties' breaches of the Three-Party Agreement, Dr. Michelson has sustained damages in an amount to be proven at trial, but in no event less than \$75,000.

TWELFTH COUNTERCLAIM FOR RELIEF

(Fraud)

112. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 111 above.

113. During the negotiations that preceded the Three-Party Agreement, the Medtronic Parties, who as a consequence of Medtronic's position as one of the world's preeminent manufacturers and sellers of spinal implant technology possessed special knowledge about the market for cervical plate products and its own sales in that market, made representations about the value of and the market for products based on Dr. Michelson's cervical plate technology. In particular, the Medtronic Parties provided projections of future sales projecting that the products would have only a five-year life in the market and would generate at most \$30 million in sales per year. The Medtronic Parties represented that this limited market had little value to them and that they required additional financial incentive, in the form of a reduction in Dr. Michelson's royalty rate that would give them a higher profit margin, to pursue it. The Medtronic Parties also

represented and promised in the Three-Party Agreement and during the preceding negotiations that they would pay Dr. Michelson royalties and give him name recognition in accordance with the terms of the Three-Party Agreement and the Danek License Agreement as amended by the Three-Party Agreement.

114. The Medtronic Parties' foregoing representations and promises were in fact false. Dr. Michelson is informed and believes that the true facts were that at the time, Medtronic was already selling cervical plate products at levels far greater than shown in the projections the Medtronic Parties provided to Dr. Michelson, and that they knew that the market for such products was not limited to five years (indeed, they had plans to exploit the technology far into the future) or to \$30 million per year and that they would in the future sell far more products for a far longer period of time, and reap much greater profits, than they represented to Dr. Michelson. Instead, the Medtronic Parties intended for Dr. Michelson to enter into the Three-Party Agreement and thereby allow Medtronic, through Holdings, to remain a licensee of the MultiLock Technology pursuant to the Danek License Agreement so that the Medtronic Parties could and would usurp for themselves the financial and other benefits of the MultiLock Technology.

115. Dr. Michelson is informed and believes and thereon alleges that when the Medtronic Parties made the foregoing representations and promises they knew them to be false, and made them with the intent to defraud and deceive Dr. Michelson and

with the intent to induce Dr. Michelson to act in the manner herein alleged.

116. Dr. Michelson, at the time the foregoing representations and promises were made by the Medtronic Parties and at the time Dr. Michelson took the actions herein alleged, was ignorant of the falsity of the Medtronic Parties' representations and promises and believed them to be true. In reasonable reliance on those representations and promises, Dr. Michelson among other things entered into the Three-Party Agreement, thereby allowing Medtronic (through Holdings) to remain a licensee of the MultiLock Technology pursuant to the Danek License Agreement and agreeing to accept royalties on net sales of MultiLock products at the rate of 3% instead of the 8% that Dr. Michelson would otherwise have been entitled to from Wright. If Dr. Michelson had known of the actual facts, he would not have taken such actions.

117. As a direct and proximate result of the Medtronic Parties' misrepresentations and false promises, Dr. Michelson was induced to enter into the Three-Party Agreement, thereby allowing Medtronic (through Holdings) to remain a licensee of the MultiLock Technology pursuant to the Danek License Agreement and agreeing to accept royalties on net sales of MultiLock products at the rate of 3% instead of the 8% he would otherwise have been entitled to from Wright. As a direct and proximate result of the foregoing, Dr. Michelson has sustained damages, including the difference between royalties calculated at the rate of 8% instead

of the 3% rate he was fraudulently induced to agree to, in an amount to be proven at trial, but in no event less than \$75,000, and is entitled to all other appropriate legal and equitable remedies.

118. In acting as herein above alleged, the Medtronic Parties were guilty of fraud, oppression and malice and acted with the intent to vex, injure or annoy, and with conscious disregard of Dr. Michelson's rights. Dr. Michelson is therefore entitled to recover punitive or exemplary damages against the Medtronic Parties in an amount to be determined at trial, according to proof.

THIRTEENTH COUNTERCLAIM FOR RELIEF

(Unjust Enrichment -- MultiLock Technology)

119. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 118 above.

120. As alleged above, the Medtronic Parties fraudulently induced Dr. Michelson to enter into the Three-Party Agreement, thereby allowing Medtronic (through Holdings) to remain a licensee of the MultiLock Technology and agreeing to accept royalties on net sales of MultiLock products at the rate of 3% instead of the 8% that Dr. Michelson would otherwise have been entitled to from Wright. As a consequence, the Medtronic Parties have obtained and continue to obtain profits equal to, at a minimum, the resulting differential of 5% of net sales of MultiLock products.

121. Given the acts of the Medtronic Parties alleged above, including, among other things, their fraudulent inducement of the Three-Party Agreement and their many and continuing breaches of contract, the Medtronic Parties' retention of such profits under such circumstances is inequitable and unjust.

122. The Medtronic Parties' inequitable and unjust enrichment has come at the expense of Dr. Michelson.

123. This injustice can be avoided only if the Medtronic Parties return to Dr. Michelson any profits they obtained through their fraudulent inducement of the Three-Party Agreement.

124. In order to determine the amount of the Medtronic Parties' unjust enrichment, an accounting of the profits obtained through their fraudulent inducement of the Three-Party Agreement is necessary.

FOURTEENTH COUNTERCLAIM FOR RELIEF

(Declaratory Relief -- Danek License Agreement)

125. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 124 above.

126. The Three-Party Agreement provides, in relevant part, that Dr. Michelson "is a third party beneficiary of the Danek License Agreement" and grants Dr. Michelson the right, among others, to "terminate the Danek License Agreement pursuant to Section 5.3 thereof in the event of failure by [the Medtronic

Parties] to comply with the terms of the Danek License Agreement, as amended by [the Three-Party] Agreement."

127. An actual controversy has arisen and now exists relating to the parties' respective rights and duties. For the reasons alleged above, counterclaimants contend that the Medtronic Parties have failed to comply with the terms of the Danek License Agreement, as amended by the Three-Party Agreement, and that Dr. Michelson is entitled to terminate the Danek License Agreement for that reason. Counterclaimants are informed and believe, and on that basis allege, that the Medtronic Parties dispute that they have failed to comply with the terms of the Danek License Agreement, as amended by the Three-Party Agreement, or that Dr. Michelson is entitled to terminate the Danek License Agreement.

128. Counterclaimants desire a judicial determination of the parties' rights and duties under the Three-Party Agreement regarding the Medtronic Parties' compliance with the terms of the Danek License Agreement, as amended by the Three-Party Agreement and Dr. Michelson's right to terminate the Danek License Agreement.

129. A judicial declaration is necessary and appropriate at this time in order that counterclaimants may know whether the Medtronic Parties' conduct constitutes a failure to comply with the terms of the Danek License Agreement, as amended by the Three-Party Agreement, entitling Dr. Michelson to terminate the Danek License Agreement. A judicial declaration

will help eliminate uncertainties and controversies that otherwise might result in other litigation.

FIFTEENTH COUNTERCLAIM FOR RELIEF

(Misappropriation of Trade Secrets)

130. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 129 above.

131. The counterclaimants dedicated substantial time and resources to the development, testing and utilization of certain of the New Inventions as to which they have not yet filed and/or received patents (the "Trade Secrets").

132. The Trade Secrets are neither commonly known nor easily discoverable by the counterclaimants' competitors. The counterclaimants were only able to create the Trade Secrets through great time, effort, and expense. Hence, the Trade Secrets give the counterclaimants a significant and valuable competitive advantage in the marketplace for technology and techniques used in spinal surgery, stabilization, and related procedures.

133. The counterclaimants expend great effort and expense to preserve the strict confidentiality of the Trade Secrets, and to prevent any unauthorized disclosure thereof. Among other things, the counterclaimants restrict access to Trade Secret information only to employees on a need-to-know basis, and maintain the bulk of the Trade Secret information and information

related thereto in locked areas with access limited to those employees with a "need to know."

134. In addition, to protect the confidential and proprietary nature of the Trade Secrets, the counterclaimants require employees and others given access to the Trade Secrets to agree in writing to protect the information from improper use or public disclosure.

135. In connection with the parties' ongoing negotiations of a global purchase agreement, Medtronic executed the Confidentiality Agreements. As a consequence, Medtronic was given access to and became familiar with certain Trade Secrets, which it misappropriated, used and disclosed to others, and which it continues to misappropriate, use and disclose by, among other things, filing patent applications and having patents issue based wholly or in part on the Trade Secrets, filing patent applications and having patents issue based on works derived from the Trade Secrets, and commercially exploiting the Trade Secrets.

136. As a direct and proximate result of Medtronic's misappropriation, use and disclosure of the counterclaimants' Trade Secrets, the counterclaimants have sustained damages in an amount to be proven at trial, but in no event less than \$75,000.

137. As a further direct and proximate result of Medtronic's misappropriation, use and disclosure the counterclaimants' Trade Secrets, Medtronic has been unjustly enriched in that it has the ability to develop, promote and market technology and techniques for use in spinal surgery,

stabilization and related procedures that are substantially based on and/or incorporate the material elements of the counterclaimants' Trade Secrets.

138. The continued misappropriation, use and disclosure of the counterclaimants' Trade Secrets by Medtronic threatens to and will cause great and irreparable injury to the counterclaimants' market competitiveness and to the counterclaimants' ability to develop, promote and market their own technology and techniques for use in spinal surgery, stabilization, and related procedures. Unless immediate injunctive relief as prayed for herein is granted, the counterclaimants will sustain great and irreparable injury from the misappropriation, use and disclosure their Trade Secrets.

139. In misappropriating, using and disclosing the counterclaimants' Trade Secrets, Medtronic's conduct was willful and was intended to cause injury to the counterclaimants in that Medtronic acted with oppression, fraud and malice in misappropriating, using and disclosing the Trade Secrets to deprive the counterclaimants of substantial ongoing and future profits from their technology and techniques for use in spinal surgery, stabilization and related procedures. The counterclaimants are therefore entitled to recover punitive or exemplary damages against Medtronic in an amount to be determined at trial, according to proof.

SIXTEENTH COUNTERCLAIM FOR RELIEF

(Breach of Contract -- Confidentiality Agreements)

140. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 139 above.

141. At various times over the past several years, counterclaimants and Medtronic have entered into the Confidentiality Agreements for the purpose of allowing Medtronic to determine whether it wanted to acquire certain of Dr. Michelson's New Inventions.

142. For example, pursuant to the February 3, 1998 Confidentiality Agreement, Medtronic agreed to maintain in confidence certain confidential information "concerning the design, development, manufacture, testing, and other matters relating to interbody fusion implant instrument, and method technology," disclosed by the counterclaimants and to not "use, disclose, or make available to any third party" such confidential information without the counterclaimants' authorization.

143. In reliance on these promises by Medtronic, the counterclaimants agreed to and did disclose a variety of confidential, proprietary and trade secret information relating to certain of Dr. Michelson's New Inventions, which related to interbody fusion implant, instrument, and method technology.

144. Medtronic has breached the Confidentiality Agreements by, among other things, taking some of the New Inventions and filing its own patent applications and receiving

patents naming other individuals as the inventors of those New Inventions, filing patent applications and receiving patents in the names of other inventors for inventions derived from technology disclosed by Dr. Michelson pursuant to the Confidentiality Agreements, and making other unauthorized commercial use of Dr. Michelson's New Inventions.

145. The counterclaimants have duly performed all of the conditions of the Confidentiality Agreements, other than those conditions which have been waived by Medtronic or excused by its breaches of the Confidentiality Agreements.

146. As a direct and proximate result of Medtronic's breaches of the Confidentiality Agreements, the counterclaimants have sustained damages in an amount to be proven at trial, but in no event less than \$75,000.

SEVENTEENTH COUNTERCLAIM FOR RELIEF

(Unfair Competition)

147. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 146 above.

148. Medtronic's wrongful acts and conduct as alleged herein above, constitute unfair and unlawful competition.

149. Said unfair competition threatens to and will cause great and irreparable injury to the counterclaimants in that such conduct will result in the loss of substantial opportunities for the exploitation of the Threaded Spinal Implant Technology, the Non-Threaded Spinal Implant Technology, and the

New Inventions. The damages that will be sustained by the counterclaimants by reason thereof cannot readily be ascertained or calculated, and unless immediate injunctive relief as prayed for herein is granted, the unfair competition will have been completed, rendering ineffective a final judgment. By reason thereof, the counterclaimants have no adequate remedy at law for such acts and threatened acts.

EIGHTEENTH COUNTERCLAIM FOR RELIEF

(Tortious Interference With Contract)

150. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 17 and 20 through 149 above.

151. The Three-Party Agreement is an enforceable contract between Dr. Michelson and Holdings. At all relevant times Medtronic was aware of the terms of this contract.

152. If Medtronic was not a party, through Holdings, to the Three-Party Agreement, Medtronic, as described above, knew of the existence of and purposefully and intentionally induced Holdings to breach the Three-Party Agreement.

153. Medtronic's interference was improper and unjustified.

154. As a direct and proximate result of Medtronic's interference, Dr. Michelson has sustained damages in an amount to be proven at trial, but in no event less than \$75,000.

NINETEENTH COUNTERCLAIM FOR RELIEF

(False Designation of Origin, Lanham Act, 15 U.S.C. § 1125)

155. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 154 above.

156. As alleged above, the Medtronic Parties have failed to give proper patent notice and to give appropriate name recognition in marking the products based on Dr. Michelson's technology and in their literature, including but not limited to, their advertising and marketing materials. Instead, the Medtronic Parties have knowingly and falsely described, claimed and/or conveyed the impression on the products and in various publications, including without limitation their advertising and marketing materials, that the products based on Dr. Michelson's technology are in fact their own inventions or the inventions of their employees, agents or affiliates.

157. This false designation of origin has caused and is likely to cause confusion in the trade and in the marketplace and is likely to mislead, confuse and deceive consumers as to the source and origin of such products.

158. The counterclaimants have been harmed by the Medtronic Parties' false designation of origin of the products based on Dr. Michelson's technology in an amount to be determined by the trier of fact. In addition to actual damages, as a result of being deprived of proper credit Dr. Michelson's reputation has not been enhanced commensurate with his work. By losing the

enhanced reputation which would otherwise accompany Dr. Michelson's high-quality work, the counterclaimants' future ability to sell or charge a premium for Dr. Michelson's inventions has been diminished.

159. As a direct and proximate result of the Medtronic Parties' false designation of origin, the counterclaimants will continue to be irreparably damaged. The counterclaimants are entitled to an injunction restraining the Medtronic Parties, their officers, agents and employees, and all persons acting in concert or participation with them, from engaging in any further such false designation of origin as alleged above.

160. The counterclaimants are further entitled to recover from the Medtronic Parties the damages, including attorneys' fees, they have sustained and will sustain, and any gains, profits and advantages obtained by the Medtronic Parties as a result of the Medtronic Parties' false designation of origin alleged above, in an amount to be proven at trial, and exemplary damages including treble damages.

TWENTIETH COUNTERCLAIM FOR RELIEF

(Monopolization, Sherman Antitrust Act, 15 U.S.C. § 2
and Clayton Act 15 U.S.C. § 15)

161. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 160 above.

162. Medtronic is a multi-billion dollar medical technology company engaged in the business of developing,

manufacturing and selling medical devices. Interbody spinal fusion implants are one of the many types of medical devices that Medtronic manufactures and sells. Counterclaimants are informed and believe, and thereon allege, that Medtronic is the dominant leader in the United States market for spinal implants, and that Medtronic possesses monopoly power within that lucrative market. Counterclaimants, who are engaged in the business of developing certain spinal implants and selling and licensing the rights to manufacture and sell them, are competitors within that market.

163. Counterclaimants are informed and believe, and thereon allege, that Medtronic has willfully sought to acquire and maintain its power in the lucrative interbody spinal implant market through unlawful activity as distinguished from growth and development through lawful means. Specifically, as an example of Medtronic's unlawful activity -- without limitation of other examples that counterclaimants are unaware of -- counterclaimants are informed and believe, and thereon allege, that throughout the last several years Medtronic has willfully sought to suppress competition within that market by "pooling" a large number of Dr. Michelson's patents relating to interbody spinal fusion implants, and then "shelving" the technology with the intention of preventing it from being fully exploited. Medtronic engages in this practice so that Medtronic's own older and higher-priced products maintain their dominant share of the market.

164. As a result of Medtronic's practice of "pooling" and then "shelving" Dr. Michelson's patents, Medtronic has:

(a) restrained trade and commerce, and discouraged and prevented other potential competitors, including counterclaimants, from selling interbody spinal fusion implants to any other company or person; and

(b) obtained higher, arbitrary and unreasonable prices for its own products.

165. Medtronic has not only denied counterclaimants substantial cash flow in the form of royalties that the Medtronic Parties were obligated to pay for their sale of products using Dr. Michelson's patents, but Medtronic has further denied counterclaimants -- along with other companies who were in a position to purchase or obtain a license to Dr. Michelson's patents -- the opportunity to compete with Medtronic in the interbody spinal fusion market.

166. As such, the anti-competitive effect of Medtronic's unlawful activities has injured counterclaimants and other businesses. There are substantial entry barriers to the interbody spinal fusion implant market, including those presented by the patent prosecution and regulatory approval processes, that prevent new rivals from entering this market and timely responding to an increase in price above the competitive level, such as that caused by Medtronic's unlawful practices. Indeed, because of Medtronic's practice of "pooling" and then "shelving" Dr. Michelson's patents and the existing entry barriers to the market, counterclaimants are prevented from developing and marketing competing products that use Dr. Michelson's Threaded

and Non-Threaded Spinal Implant Technology. Moreover, other companies, who are interested in promoting Dr. Michelson's technology, similarly are prevented from acquiring it and competing with Medtronic, who "shelved" the technology so that its own competing products would continue to dominate the market. In addition, Medtronic's practices harm medical patients and other consumers of interbody spinal fusion implants who are forced to pay higher prices for older products, and are denied the opportunity to choose other beneficial medical alternatives.

167. These acts by Medtronic constitute improper monopolization. By reason of Medtronic's acts alleged herein, the counterclaimants have suffered damage in an amount to be proved at trial. Pursuant to 15 U.S.C. § 15, the counterclaimants are entitled to damages arising out of Medtronic's unlawful actions, and that the damages so ascertained be trebled and awarded to the counterclaimants, together with interest, the costs of the suit, and attorney's fees.

TWENTY-FIRST COUNTERCLAIM FOR RELIEF

(Attempted Monopolization, Sherman Antitrust Act 15 U.S.C. § 2,
and Clayton Act 15 U.S.C. §15)

168. Counterclaimants reallege and incorporate by reference the allegations contained in paragraphs 1 through 167 above.

169. Medtronic promised in the Purchase and License Agreements to use its best efforts to obtain regulatory approval and to actively promote the sale of counterclaimants' Threaded

and Non-Threaded Spinal Implant Technology. Counterclaimants are informed and believe, and thereon allege, that Medtronic never intended to use its best efforts in obtaining regulatory approval or promoting the sale of Dr. Michelson's Threaded and Non-Threaded Spinal Implant Technology.

170. Counterclaimants are informed and believe, and thereon allege, that instead, Medtronic intended to monopolize the interbody spinal fusion implant market, and that Medtronic's acquisition of a "pool" of Dr. Michelson's patents and practice of "shelving" them is part of an anti-competitive and predatory scheme designed to further that intent.

171. Counterclaimants are informed and believe, and thereon allege, that because Medtronic already possesses dominant power within that market and has already "pooled" and "shelved" a large number of Dr. Michelson's competing patents, that there is a dangerous probability that Medtronic's scheme will, in fact, further its attempt to monopolize and restrain trade in the interbody spinal fusion implant market. As previously stated, there are substantial entry barriers to the interbody spinal fusion implant market that prevent potential competitors from entering the market and competing effectively. Indeed, as an example that Medtronic's scheme will further its attempt to gain monopoly power -- without limitation of other examples that counterclaimants are unaware of -- counterclaimants are informed and believe, and thereon allege, that Medtronic has recently dedicated substantial resources to the development and marketing

of other Medtronic products, such as implants made out of bone, instead of marketing competing products using the Threaded and Non-Threaded Spinal Implant Technology that it purchased from Dr. Michelson. Counterclaimants are informed and believe, and thereon allege, that Medtronic's practice has allowed it to demand higher prices for these products than it otherwise could.

172. In addition, counterclaimants are informed and believe, and thereon allege, that Medtronic recently filed its complaint in this action as "sham litigation" that constitutes another unlawful attempt to willfully pursue and maintain its monopoly in the interbody spinal fusion implant market.

173. First, Medtronic violated the notice and cure and dispute resolution provisions contained in both the License Agreement and the Purchase Agreement when it secretly prepared and filed this action.

174. Second, Medtronic's suit is objectively baseless, in that no reasonable litigant could realistically expect success on the merits. For example, Medtronic claims it owns all of Dr. Michelson's existing and future patents, despite the fact that for several years the Medtronic Parties acknowledged that they did not own the patents, and that they wished to purchase them from Dr. Michelson in a global agreement. Even in the negotiation and drafts of the global agreement, it was never contemplated that the Medtronic Parties would get all of Dr. Michelson's inventions, many of which they are not even in the business of manufacturing and selling.

175. Third, counterclaimants are informed and believe, and thereon allege, that Medtronic's suit is subjectively motivated as an attempt by Medtronic to directly interfere with the counterclaimants' business and prospective business relationships. Pursuant to the License Agreement and Purchase Agreement, counterclaimants possess the right to reacquire both the Threaded and Non-Threaded Spinal Implant Technology if Medtronic fails to use its best efforts "to obtain regulatory approval and to actively promote the sale" of the Threaded and Non-Threaded Spinal Implant Technology. Medtronic has not used its best efforts towards that end, and counterclaimants therefore have the right to reacquire the technology. Medtronic's suit is designed to interfere with that right, and to prevent counterclaimants from reacquiring the technology and exploiting it on their own.

176. The anti-competitive effect of Medtronic's attempted monopolization has injured counterclaimants and other businesses. Because of Medtronic's practice of "pooling" and then "shelving" Dr. Michelson's patents and the existing entry barriers to the market, counterclaimants and other companies are prevented from developing and marketing competing products using Dr. Michelson's Threaded and Non-Threaded Spinal Implant Technology. Moreover, due to Medtronic's "sham litigation," counterclaimants are similarly prevented from moving forward with new business opportunities with other companies who are interested in acquiring and using that technology. In addition,

Medtronic's practices harm medical patients and other consumers of interbody spinal fusion implants who are forced to pay higher prices for older products, and are denied the opportunity to choose other beneficial medical alternatives.

177. These acts by Medtronic constitute improper attempted monopolization. By reason of Medtronic's acts alleged herein, the counterclaimants have suffered damage in an amount to be proved at trial. Pursuant to 15 U.S.C. § 15, the counterclaimants are entitled to damages arising out of Medtronic's unlawful actions, and that the damages so ascertained be trebled and awarded to the counterclaimants, together with interest, the costs of the suit, and attorney's fees.

PRAYER FOR RELIEF

WHEREFORE, counterclaimants pray for judgment against Medtronic, as follows:

A. On the First Counterclaim for Relief:

1. That, the Court find that Dr. Michelson is the owner of United States Patent Nos. 5,797,909, 6,080,155, 6,159,214, 6,210,412 and 6,270,498 (the "Patents"), and that these patents are valid and infringed by Medtronic;

2. That, pursuant to 35 U.S.C. § 283, Medtronic and all of its officers, agents, servants, employees, and those persons in active concert or participation with it, be preliminarily and permanently enjoined from directly or indirectly infringing, or inducing or contributing to the infringement of, the Patents.

3. That, pursuant to 35 U.S.C. § 284, counterclaimants be awarded damages arising out of Medtronic's infringement of the patents, including, as applicable, counterclaimants' lost profits, and that the damages so ascertained be trebled and awarded to counterclaimants, together with interest and costs; and

4. That, pursuant to 35 U.S.C. § 285, counterclaimants be awarded their attorneys' fees.

B. On the Second Counterclaim for Relief, that Karlin be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon.

C. On the Third Counterclaim for Relief:

1. That, the Court find that Karlin is the owner of United States Patent Nos. 5,015,247 ("the '247 patent") and 6,149,650 ("the '650 patent"), and that these patents are valid and infringed by Medtronic;

2. That, pursuant to 35 U.S.C. § 283, Medtronic and all of its officers, agents, servants, employees, and those persons in active concert or participation with it, be preliminarily and permanently enjoined from directly or indirectly infringing, or inducing or contributing to the infringement of, the Patents.

3. That, pursuant to 35 U.S.C. § 284, Karlin be awarded damages arising out of Medtronic's infringement of the patents, including, as applicable, lost profits, and that the

damages so ascertained be trebled and awarded to counter-claimants, together with interest and costs; and

4. That, pursuant to 35 U.S.C. § 285, Karlin be awarded its attorneys' fees.

D. On the Fourth Counterclaim for Relief, that the Court enter a decree of specific performance directing Medtronic to recognize Karlin's rights under Section 4.4 of the License Agreement and honor Medtronic's obligations in connection therewith.

E. On the Fifth Counterclaim for Relief:

1. That Karlin be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon; and

2. That Karlin be awarded punitive or exemplary damages in an amount to be determined at trial, according to proof.

F. On the Sixth Counterclaim for Relief, that Medtronic be ordered to render an accounting of and disgorge to Karlin any and all profits obtained by Medtronic as a result of its wrongful acts.

G. On the Seventh Counterclaim for Relief, that Dr. Michelson be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon.

H. On the Eighth Counterclaim for Relief, that the Court enter a decree of specific performance directing Medtronic to recognize Dr. Michelson's rights under Section 4.5 of the

Purchase Agreement and honor Medtronic's obligations in connection therewith.

I. On the Ninth Counterclaim for Relief:

1. That Dr. Michelson be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon; and

2. That Dr. Michelson be awarded punitive or exemplary damages in an amount to be determined at trial, according to proof.

J. On the Tenth Counterclaim for Relief, that Medtronic be ordered to disgorge to Dr. Michelson any and all profits obtained by Medtronic as a result of its wrongful acts.

K. On the Eleventh Counterclaim for Relief, that Dr. Michelson be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon.

L. On the Twelfth Counterclaim for Relief:

1. That Dr. Michelson be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon and all other appropriate legal and equitable remedies; and

2. That Dr. Michelson be awarded punitive or exemplary damages in an amount to be determined at trial, according to proof.

M. On the Thirteenth Counterclaim for Relief, that the Medtronic Parties be ordered to render an accounting of and

disgorge to Dr. Michelson any and all profits obtained by them as a result of their wrongful acts.

N. On the Fourteenth Counterclaim for Relief, that the Court declare that the Medtronic Parties have failed to comply with the terms of the Danek License Agreement, as amended by the Three-Party Agreement, and that Dr. Michelson is entitled to terminate the Danek License Agreement for that reason.

O. On the Fifteenth Counterclaim for Relief:

1. That counterclaimants be awarded preliminary and permanent injunctive relief:

(a) ordering Medtronic and all those acting in active concert or participation with it to return to the counterclaimants all originals and all copies of any and all documentation and other materials comprising, containing or describing the Trade Secrets and any other intellectual property belonging to the counterclaimants in any such person's or entity's possession, custody or control; and

(b) enjoining Medtronic and all those acting in active concert or participation with it from using, disclosing or transmitting for any purposes, the Trade Secrets and any other intellectual property belonging to the counterclaimants and any products based on the foregoing.

2. That counterclaimants be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon; and

3. That counterclaimants be awarded punitive or exemplary damages in an amount to be determined at trial, according to proof.

P. On the Sixteenth Counterclaim for Relief, that counterclaimants be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon.

Q. On the Seventeenth Counterclaim for Relief, that counterclaimants be awarded preliminary and permanent injunctive relief:

1. Enjoining Medtronic and all of its officers, agents, servants, employees, and those persons in active concert or participation with it from directly or indirectly infringing, or inducing or contributing to the infringement of, the Patents;

2. Ordering Medtronic and all those acting in active concert or participation with it to return to the counterclaimants all originals and all copies of any and all documentation and other materials comprising, containing or describing the Trade Secrets and any other intellectual property belonging to the counterclaimants in any such person's or entity's possession, custody or control; and

3. Enjoining Medtronic and all those acting in active concert or participation with it from using, disclosing or transmitting for any purposes, the Trade Secrets and any other intellectual property belonging to the counterclaimants and any products based on the foregoing.

R. On the Eighteenth Counterclaim for Relief:

1. That Dr. Michelson be awarded damages according to proof, but in no event for an amount less than \$75,000, plus accrued interest thereon;

2. That Dr. Michelson be awarded punitive or exemplary damages in an amount to be determined at trial, according to proof.

S. On the Nineteenth Counterclaim for Relief:

1. That counterclaimants be awarded preliminary and permanent injunctive relief:

a. Enjoining the Medtronic Parties and all of their officers, agents, servants, employees, and those persons in active concert or participation with them from directly or indirectly designating products based on Dr. Michelson's inventions as their own inventions or inventions of their employees, agents or affiliates;

b. Ordering the Medtronic Parties and all those acting in active concert or participation with them to turn over to counterclaimants any and all materials, including without limitation all advertising and marketing materials, designating products based on Dr. Michelson's inventions as their own inventions or inventions of their employees, agents or affiliates, as well as all artwork, or other material used to produce such materials;

c. Ordering the Medtronic Parties and all those acting in active concert or participation with them to turn

over to counterclaimants any and all products based on Dr. Michelson's inventions which have been designated in any materials, including without limitation advertising and marketing materials, as inventions of the Medtronic Parties or their employees, agents or affiliates, together with any and all materials used to produce such products;

d. Ordering the Medtronic Parties, within thirty (30) days after the service of judgment upon them, with notice of entry thereof, to file with the Court and serve upon counterclaimants a written report under oath setting forth in detail the manner in which they have complied with subparagraphs a through c, supra;

2. For compensatory damages and disgorgement of the Medtronic Parties' profits according to proof; and

3. For treble and exemplary damages according to proof.

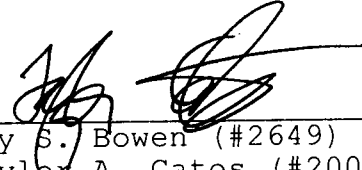
T. On the Twentieth Counterclaim for Relief, that counterclaimants be awarded damages according to proof, but in no event for an amount less than \$75,000, and that the damages so ascertained be trebled and awarded to counterclaimants.

U. On the Twenty-First Counterclaim for Relief, that counterclaimants be awarded damages according to proof, but in no event for an amount less than \$75,000, and that the damages so ascertained be trebled and awarded to counterclaimants.

V. On all Counterclaims for Relief:

1. That counterclaimants be awarded their costs of suit;
2. That counterclaimants be awarded their attorneys' fees;
3. That counterclaimants be awarded prejudgment interest; and
4. That the Court grant such other and further relief as the Court may deem just and proper.

DATED: October 15, 2001 Respectfully submitted,



Jay S. Bowen (#2649)
Taylor A. Cates (#20006)
Bowen Riley Warnock & Jacobson
1906 West End Avenue
Nashville, TN 37203

Marc Marmaro
Stanley M. Gibson
Dan P. Sedor
Jeffer, Mangels, Butler &
Marmaro LLP
10th Floor, 2121 Avenue of the Stars
Los Angeles, CA 90067-5010

Robert G. Krupka
Boaz M. Brickman
Walker A. Matthews
Kirkland & Ellis
777 South Figueroa Street
Los Angeles, California 90017


Attorneys for Defendant,
Counterclaimant and Third Party
Plaintiff Gary K. Michelson, M.D.
and Defendant and Counterclaimant
Karlin Technology, Inc.

DEMAND FOR JURY TRIAL

Counterclaimants demand a jury trial on all issues so triable.

DATED: October 5, 2001

Respectfully submitted,



Jay S. Bowen (#2649)
Taylor A. Cates (#20006)
Bowen Riley Warnock & Jacobson
1906 West End Avenue
Nashville, TN 37203

Marc Marmaro
Stanley M. Gibson
Dan P. Sedor
Jeffer, Mangels, Butler &
Marmaro LLP
10th Floor, 2121 Avenue of the Stars
Los Angeles, CA 90067-5010

Robert G. Krupka
Boaz M. Brickman
Walker A. Matthews
Kirkland & Ellis
777 South Figueroa Street
Los Angeles, California 90017

Attorneys for Defendant,
Counterclaimant and Third Party
Plaintiff Gary K. Michelson, M.D.
and Defendant and Counterclaimant
Karlin Technology, Inc.

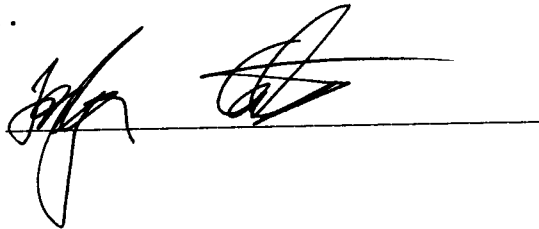
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via First Class United States Mail upon:

Leo Bearman, Jr.
Bradley E. Trammell
Baker, Donelson, Bearman & Caldwell
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

Raphael V. Lupo
Jack Q. Lever
Melvin White
Michael D. Switzer
McDermott, Will & Emery
600 13th Street, N.W.
Washington, DC 20005
(202) 756-8000

this 15th day of October, 2001.



Two handwritten signatures are present above a horizontal line. The signature on the left is written in dark ink and appears to be 'John'. The signature on the right is written in black ink and is more stylized, possibly 'Lupo'.