

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

BioTex, Inc.

Plaintiff,

v.

Heidelberg Engineering, Inc.,

Defendant.

Civil Action No. \_\_\_\_\_

**Jury Trial Demanded**

**ORIGINAL COMPLAINT**

Plaintiff BioTex, Inc., (“Plaintiff” or “BioTex”), by and through its attorneys, for its Complaint, hereby alleges as against Defendant Heidelberg Engineering, Inc. (“Heidelberg”) as follows:

**I. NATURE OF THE ACTION**

1. This is an action for patent infringement arising under the patent laws of the United States, 35 U.S.C. §§ 271, *et seq.*, to enjoin and obtain damages resulting from Defendant’s unauthorized manufacture, use, sale, offer to sell and/or importation into the United States for subsequent use or sale of products, methods, processes, services and/or systems that infringe one or more claims of United States Patent No. 6,507,747, issued on January 14, 2003, for “Method and Apparatus For Concomitant Structural and Biochemical Characterization of Tissue,” naming Ashok Gowda, Roger McNichols and Massoud Motamedi as inventors (the “747 patent”), a true and correct copy of which is attached hereto as **Exhibit 1**.

2. This action for patent infringement involves Defendant’s manufacture, use, sale, offer for sale, and/or importation into the United States of infringing products, methods,

processes, services and systems that operate using Heidelberg's spectral domain optical coherence tomography, including the Spectralis HRA-OCT (collectively the "Accused Products").<sup>1</sup>

## II. PARTIES

3. Plaintiff BioTex, Inc. is a corporation organized and existing under the laws of the State of Texas, with its principal place of business at 8058 El Rio Street, Houston, Texas 77054.

4. On information and belief, Heidelberg Engineering, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1499 Poinsettia Ave., Suite 160, Vista, CA 92081-8543, USA. Heidelberg may be served with process by serving its registered agent, The Company Corporation, 2711 Centerville Road, Suite 400, Wilmington, DE 19808.

## III. JURISDICTION AND VENUE

5. This Court has exclusive jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1338(a).

6. Defendant is subject to personal jurisdiction in Texas because they regularly transact business in this judicial district and division by, among other things, offering for sale and selling its products and services to customers, business affiliates and partners located in this judicial district and division. In addition, the Defendant has committed acts of direct

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<sup>1</sup> The term "Accused Products" encompasses all of Heidelberg's spectral domain optical coherence tomography, including the Spectralis HRA-OCT. Upon further investigation and discovery, BioTex may identify additional Accused Products and/or seek to assert additional claims.

infringement, contributory infringement, and/or inducement of infringement, of one or more of the claims of the '747 patent in this judicial district and division.

7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and 1400(b) because the Defendant is subject to personal jurisdiction in this district, and have committed acts of infringement in this district.

#### **IV. FACTUAL ALLEGATIONS**

##### INTERACTION LABORATORIES, INC. ("INTERACTION LABS")

8. BioTex, Inc. is a Texas corporation founded in 1997 by scientist engineers from Texas A&M University. The mission of BioTex has been to explore, develop, and commercialize novel optical technologies for medical, biomedical, and environmental applications.

9. In 1998, BioTex and the University of Texas Medical Branch at Galveston ("UTMB") formulated the concept of combining optical coherence tomography ("OCT") with spectroscopy and spectroscopic imaging including fluorescence imaging.

10. On November 26, 1999, realizing that the value of the information which could be obtained from OCT would be increased if correlated to spectral or fluorescence information, BioTex and UTMB jointly filed Application Serial No. 09/449,803, which resulted in the '747 patent, entitled "Method and Apparatus for Concomitant Structural and Biochemical Characterization of Tissue."

11. Since filing the patent, BioTex and UTMB have also jointly pursued federal grant funding to explore and test the technology. To date, BioTex has secured significant grants from

the National Institutes of Health, including NIH GRANT# 1 R43 CA81798-01 “An Integrated Optical Approach for Endoscopic Detection of Cancer”, NIH GRANT# 1 R43 DE14503-01 “Novel Optical Probe for Oral and Dental Tissue Screening”, NIH GRANT# 1 R43 CA101161-01 “Novel Optical System for Early Cervical Cancer Detection” and NIH GRANT# 2 R44 DE014503-02 “Novel Optical Probe for Oral and Dental Tissue Screening”. In addition, a scientific article about the technology was published: McNichols, Gowda, Bell, Johnigan, Calhoun, Motamedi, “Development of an Endoscopic Fluorescence Image-guided Probe for Oral Cancer Detection.” Proceedings of the SPIE, Vol. 4254:23. 2001. BioTex has developed and tested imaging systems which have evolved through a fifth generation. These devices have been used in both animal and human subjects in to simultaneously collect coregistered OCT and fluorescence imaging data.

12. BioTex continues to actively develop and pursue the technology in both scientific and commercial ways. For example, BioTex has continued human studies at UTMB and has explored commercialization with prospective medical device partners.

13. In addition, BioTex has several other active development programs in the fields of OCT imaging, endoscopy and fluorescence imaging.

**BIO TEX HAS BEEN IRREPARABLY HARMED  
BY DEFENDANT’S CONTINUED INFRINGEMENT**

14. Plaintiff BioTex has been irreparably harmed by Defendant’s infringement of its valuable patent rights. Moreover, Defendant’s unauthorized, infringing use of systems and methods covered by the ‘747 patent threatens the value of this intellectual property because

Defendant's conduct has resulted in BioTex's loss of its lawful patent rights to exclude others from making, using, selling, offering to sell and/or importing the patented inventions.

15. Defendant's disregard for BioTex's property rights similarly threatens BioTex's relationships with potential licensees of this intellectual property. Defendant will derive a competitive advantage over any of BioTex's future licensees by using BioTex's patented technology without paying compensation for such use. Accordingly, unless and until Defendant's acts of infringement are enjoined, BioTex will suffer irreparable harm for which there is no adequate remedy at law.

#### HEIDELBERG

16. Heidelberg is the U.S. subsidiary of a multinational corporation that designs, develops, manufactures, exports, and distributes the Accused Products.

17. On information and belief, Heidelberg is a wholly-owned subsidiary of Heidelberg Engineering GmbH ("Heidelberg Germany").

18. On information and belief, Heidelberg has its headquarters at 1499 Poinsettia Ave., Suite 160, Vista, CA 92081-8543, USA, and imports, sells, and offers for sale the Accused Products throughout the United States.

### **V. CLAIMS**

#### **COUNT ONE – INFRINGEMENT OF THE '747 PATENT**

19. BioTex incorporates by reference its allegations in Paragraphs 1-18 as if fully restated in this paragraph.

20. BioTex is the assignee and owner of all right, title and interest to the '747 patent. BioTex has the legal right to enforce the patent, sue for infringement, and seek equitable relief and damages.

21. Defendant has been infringing and continues to infringe one or more of the claims of the '747 patent through at least the acts of making, using, selling, offering for sale and/or importing the Accused Products.

22. Defendant has indirectly infringed the '747 patent by inducing the infringement of the '747 patent and contributing to the infringement of the '747 patent. Defendant has actively and knowingly induced infringement of the '747 patent by providing its customers and others with detailed explanations, instructions, information, and support services related to arrangements, applications, and uses of its products and services that promote and demonstrate how to use its products and services in an infringing manner, and upon information and belief, those customers and others have used the products and services in an infringing manner.

23. Defendant has contributed to the infringement of the '747 patent by actively and knowingly providing its customers and others with products and services that are used as a material element in the customers' or others' infringing products and services, and the products and services provided by Defendant are not staples of commerce with substantial noninfringing uses.

24. Defendant's wrongful conduct has caused BioTex to suffer irreparable harm resulting from the loss of its lawful patent rights to exclude others from making, using, selling, offering to sell and importing the patented inventions. On information and belief, Defendant will continue these infringing acts unless enjoined by this Court.

25. Defendant, without permission of BioTex, has been and still is infringing the '747 patent as infringement is defined by 35 U.S.C. § 271. BioTex requests an award of its actual damages caused by such infringement pursuant to 35 U.S.C. § 284.

## VI. WILLFULNESS

26. BioTex incorporates by reference its allegations in Paragraphs 1-25 as if fully restated in this paragraph.

27. On April 3, 2009, BioTex sent the letters attached as **Exhibit 2** to Heidelberg. Heidelberg failed to respond to the letter, and on information and belief, continued to infringe the '747 patent. Heidelberg has failed to respond to further correspondence further identifying it of its infringement, and has continued its infringement notwithstanding its receipt of notice.

28. No later than April 7, 2009, Heidelberg had actual knowledge of the '747 patent and an assertion that the Accused Products conform to specific claims of the '747 patent. Defendant has knowingly or with reckless disregard willfully infringed the '747 patent. Defendant acted despite an objectively high likelihood that their actions constituted infringement of BioTex' valid patent rights. This objectively-defined risk was either known or so obvious that it should have been known to Defendant.

29. The infringement by Defendant is willful, thus entitling BioTex to the recovery of treble damages pursuant to 35 U.S.C. § 284. In addition, this is an "exceptional case" justifying an award of attorneys' fees and costs to BioTex pursuant to 35 U.S.C. § 285.

## **VII. JURY DEMAND**

30. Plaintiff BioTex demands a trial by jury of all matters to which it is entitled to trial by jury, pursuant to FED. R. CIV. P. 38.

## **VIII. PRAYER FOR RELIEF**

WHEREFORE, BioTex prays for judgment and seeks relief against Defendant as follows:


- A. That the Court declare that the '747 patent has been and is being infringed by Defendant;
- B. That the Court enter an injunction against further infringement of the '747 patent by Defendant, its officers, agents, servants, employees, affiliates, subsidiaries, licenses, successors and assigns and those persons acting in concert with each, including related individuals and entities, customers, representatives, dealers, and distributors;
- C. That the Court award damages adequate to compensate BioTex for the patent infringement that has occurred, together with prejudgment and post-judgment interest and costs;
- D. That the Court adjudge Defendant a willful infringer and award all other damages permitted by 35 U.S.C. § 284, including increased damages up to three times the amount of compensatory damages found;



- E. That the Court find that this is an exceptional case and award to BioTex its costs, expenses, and reasonable attorneys' fees incurred in this action as provided by 35 U.S.C. § 285; and
- F. That the Court awards such other relief as this Court deems just and proper.

Dated: July 5, 2011

Respectfully submitted,

By: 

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**ATTORNEYS FOR PLAINTIFF BIOTEX, INC.**