

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

**CONTOURMED INC.,
PLAINTIFF**

V.

**AMERICAN BREAST CARE L.P.,
DEFENDANT**

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CIVIL ACTION: _____

(JURY DEMAND)

ORIGINAL COMPLAINT

Plaintiff ContourMed Inc., (“ContourMed”) brings this Original Complaint against Defendant American Breast Care L.P (“ABC”) and shows the following:

PARTIES

1. ContourMed is a corporation duly organized and existing under the laws of the state of Delaware, with its principal place of business at 2217 Cottondale Lane, Suite A, Little Rock, Arkansas 72202.
2. On information and belief, ABC is a Georgia limited partnership, having its principal place of business at 2150 New Market Parkway Southeast, Suite 112, Marietta, Georgia 30067, and having as its registered agent Dean Benton, who can be served on behalf of ABC at the same address.

JURISDICTION AND VENUE

3. This is an action for patent infringement under 35 U.S.C. §271 *et seq.* in that ABC has infringed and is currently infringing U.S. Patent No. 7,058,439 (the “‘439 Patent”) by practicing one or more of the method claims of the ‘439 Patent and/or by indirectly infringing the ‘439 Patent.
4. This Court has subject matter jurisdiction under 28 U.S.C. §1338(a), because this action arises under the Patent Act as set forth at Title 35 of the United States Code.

5. Venue is proper in this District under 28 U.S.C. §§1391(b) and (c) because a substantial part of the events giving rise to this claim occurred in this District and because ABC is subject to personal jurisdiction in this District. Venue is further proper in this District under 28 U.S.C. §1400(b) because ABC has committed acts of infringement in this District.
6. This Court has personal jurisdiction over ABC in this action on the grounds that, upon information and belief, ABC has committed acts of patent infringement in the State of Texas and ABC does business in the State of Texas directly and through authorized retailers and distributors.

COUNT 1 –PATENT INFRINGEMENT

7. The ‘439 Patent was duly, validly, and legally issued to L. Daniel Eaton, John J. Miller, and John L. May on June 6, 2006. A true and correct copy of the ‘439 Patent is attached as Exhibit 1.
8. All United States patents are presumed valid under 35 U.S.C. §282.
9. ContourMed is the legal assignee of the ‘439 Patent, and the assignment is on record at the USPTO under reel 013222, frame 0506. By virtue of the assignment, ContourMed is the owner of the ‘439 Patent and has the right to recover damages for past and future infringement thereof.
10. ContourMed provides custom prosthesis-forming services in the U.S. using technology disclosed and claimed by the ‘439 Patent for patients who have had a mastectomy. These prosthesis-forming services include certain scanning and transformation steps.
11. ContourMed has complied with any applicable marking requirements of 35 U.S.C. §287 with respect to the ‘439 Patent.

12. ABC has had actual notice of ContourMed's patent rights since around May 27, 2015 when ContourMed filed Civil Action No. 4:15-cv-1406 in the United States District Court for the Southern District of Texas, Houston Division and advised ABC of the filing via e-mail and certified mail.

(Direct Infringement)

13. On information and belief, ABC has directly infringed and is currently directly infringing the '439 Patent in violation of 35 U.S.C. §271(a), either literally or under the doctrine of equivalents, by practicing particular methods of forming a model of a breast prosthesis for a patient who has had at least one breast partially removed, those methods being protected by at least independent claims 1 and 2 of the '439 Patent.
14. ABC's direct infringement of the '439 Patent has caused great damage to ContourMed. The amount of these damages is not yet known, but ContourMed has lost profits and royalties as a direct result of the infringement and is entitled to damages adequate to compensate it for the infringement in an amount that is in no event less than a reasonable royalty under 35 U.S.C. §284.
15. As a result of ABC's direct infringement of the '439 Patent, ContourMed has suffered and continues to suffer irreparable harm and impairment of its patent rights, and is suffering the violation of its patent rights, all of which will continue unless ABC is permanently enjoined by this Court from infringing the '439 Patent under 35 U.S.C. §283. ContourMed has no adequate remedy at law.

(Contributory and Induced Infringement)

16. ContourMed incorporates by reference all previous allegations made as if set forth herein.

17. To the extent that ABC does not, by its own actions, directly infringe the '439 Patent, on information and belief, ABC has actively contributed to and continues to actively contribute to infringement of one or more claims of the '439 Patent by offering services covered under the methods of the '439 Patent, the services constituting a material part of the invention of the '439 Patent. ABC knows that the services have no substantial non-infringing uses, in violation of 35 U.S.C. §271(c). For example, ABC receives data elements from retailers which ABC then uses to determine computer models useful for developing custom breast prostheses. ABC delivers the custom-made breast prosthesis based on the data elements to a retailer for delivery to the customer.
18. To the extent that ABC does not, by its own actions, directly infringe the '439 Patent or contribute to infringement of the '439 Patent, on information and belief, ABC has actively induced and continues to actively induce the infringement of one or more claims of the '439 Patent by causing, urging, encouraging, aiding, and/or instructing third parties to perform one or more of the claimed methods of the '439 Patent such that the third parties alone, or the third parties and ABC, directly infringe one or more of the claimed methods of the '439 Patent. For example, ABC acts with specific intent and thereby induces infringement of one or more claims of the '439 Patent by directing third party retailers to place alignment markers on the customer and scan the customer's chest to obtain the information necessary to make a custom breast prostheses. The information retrieved by the third party retailer is used by ABC to develop a CAD model, which ABC then uses to make the custom breast prosthesis. ABC delivers the breast prosthesis to the retailer, and the retailer delivers

the prosthesis to the customer. By following these directives, third-parties and ABC directly infringe one or more of the claimed methods of the '439 Patent. ABC, therefore, encourages and actively induces third parties to use scanning equipment in a manner that infringes one or more claimed methods of the '439 Patent.

19. ABC's indirect infringement of the '439 Patent has caused great damage to ContourMed. The amount of these damages is not yet known, but ContourMed has lost profits and royalties as a direct result of the infringement and is entitled to damages adequate to compensate it for the infringement in an amount that is in no event less than a reasonable royalty under 35 U.S.C. §284.
20. As a result of ABC's indirect infringement of the '439 Patent, ContourMed has suffered and continues to suffer irreparable harm and impairment of its patent rights, and is suffering the violation of its patent rights, all of which will continue unless ABC is permanently enjoined by this Court from infringing the '439 Patent under 35 U.S.C. §283. ContourMed has no adequate remedy at law.

(Willful Infringement)

21. ContourMed incorporates by reference all previous allegations made as if set forth herein.
22. ABC should have been aware, at least from around May 27, 2015, that there was an objectively high likelihood that its actions thereafter contributed to, and were inducing, patent infringement, or directly infringed, the '439 Patent.
23. ABC has no good faith basis to believe that its continuing conduct as alleged herein does not constitute patent infringement.

24. ABC's infringement since at least around May 27, 2015 has been willful and deliberate, entitling ContourMed to enhanced damages under 35 U.S.C. §284.
25. ABC's infringement since at least around May 27, 2015, without a good faith basis to believe that such conduct is not infringing, renders this an exceptional case under 35 U.S.C. §285, which entitles ContourMed to an award of attorneys' fees.

DEMAND FOR JURY TRIAL

26. Pursuant to FED. R. CIV. P. 38, ContourMed demands a trial by jury of all issues triable of right to a jury and raised by the pleadings in this action.

REQUEST FOR RELIEF

ContourMed respectfully asks this Court to summon ABC to appear and answer this Original Complaint, and after trial on the merits before a jury, enter the following orders and judgments:

- a) Finding that ABC infringes, directly and/or indirectly, the '439 Patent under 35 U.S.C. §271 *et seq.*;
- b) Permanent injunctions against ABC and its parents, subsidiaries, divisions, agents, dealers, officers, employees, successors, and assigns, and all others acting in concert or participation with ABC, from practicing the method claims of the '439 Patent;
- c) Enhanced damages in accordance with the provisions under 35 U.S.C. §285 as a result of the knowing, willful, and deliberate nature of Defendant's infringing conduct;
- d) Finding that this Action is an exceptional case, and awarding Plaintiff its attorneys' fees and costs pursuant to 35 U.S.C. §285; and
- e) Awarding ContourMed such other and further relief as the Court may deem just and proper.

Respectfully submitted,

LATHROP & GAGE LLP

/s William D. Cramer /

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