

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

TEMPUR-PEDIC MANAGEMENT, LLC,

Plaintiff,

v.

**BANYAN LICENSING, L.L.C. AND
CONTOUR PRODUCTS, INC.**

Defendants.

Civil Action No. _:_-cv-_____

JURY TRIAL DEMANDED

ORIGINAL COMPLAINT

Plaintiff Tempur-Pedic Management, LLC (“Tempu-Pedic”) files this Original Complaint for patent infringement against Defendants Banyan Licensing, L.L.C. (“Banyan”) and Contour Products, Inc. (“Contour”) and alleges as follows:

NATURE OF THE ACTION

1. This is an action arising under the patent laws of the United States, 35 U.S.C. §§ 1 *et seq.* and is brought by Tempur-Pedic against Banyan and Contour for infringement of U.S. Patent No. 6,578,218.

THE PARTIES

2. Tempur-Pedic Management, LLC is a Delaware corporation, with its principal place of business at 1000 Tempur Way, Lexington, Kentucky 40511.

3. Upon information and belief, Banyan Licensing, L.L.C. is a Florida limited liability company, with its principal place of business as 1430 West Pointe Drive, Suite K, Charlotte, North Carolina 28214.

4. Upon information and belief, Contour Products, Inc. is a Florida corporation, with its principal place of business at 1430 West Pointe Drive, Suite K, Charlotte, North Carolina 28214.

5. Upon information and belief, Banyan Licensing, L.L.C. and Contour Products, Inc. are related entities.

JURISDICTION AND VENUE

6. This is a civil action for patent infringement arising under the patent laws of the United States, Title 35, United States Code, including 35 U.S.C. §§ 271 and 281–85. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1338(a).

7. This Court has personal jurisdiction over Defendants. Defendants conduct business and have committed acts of patent infringement and/or have induced acts of patent infringement by others in this district and/or have contributed to patent infringement by others in this district, the State of Kentucky, and elsewhere in the United States. Defendants, directly and through subsidiaries or intermediaries (including distributors, retailers, and others), have purposefully and voluntarily placed one or more of their infringing products into the stream of commerce with the expectation that they will be purchased and used by consumers in the Eastern District of Kentucky. Upon information and belief, these infringing products have been and continue to be purchased and used by consumers in the Eastern District of Kentucky.

8. On information and belief, Defendants own and operate the interactive Internet website www.contourliving.com.

9. On information and belief, customers throughout the United States, including in Kentucky and in this district, have engaged in the following non-exhaustive list of conduct on Defendants' interactive website: (1) purchased infringing products; (2) created an account; (3)

provided site feedback; (4) signed up for an e-mail based newsletter; (5) accessed product guides and information related to infringing products; (6) contacted the Defendants; (7) live chatted directly with customer support and sales representatives; (8) subscribed to Defendants' blog; (9) accessed Defendants' Facebook, Google+, Twitter, Pinterest, LinkedIn, YouTube, and Instagram Internet pages which promote Defendants' infringing products; (10) accessed Defendants' eBay page which sells infringing products; (11) joined an affiliate program to earn commissions; (12) accessed coupons; and (13) provided product testimonials and reviews. Furthermore, Defendants do not restrict or otherwise prevent consumers residing in this district from interacting with Defendants website. Accordingly, Defendants have purposefully availed themselves of the benefits and privileges of conducting activities within this forum.

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

PATENT-IN-SUIT

11. On June 17, 2003, the U.S. Patent and Trademark Office ("USPTO") duly and legally issued U.S. Patent No. 6,578,218 ("the '218 Patent"), entitled "Leg Spacer Pillow," to Gerda Wassilefsky as the named inventor after a full and fair examination.

12. Tempur-Pedic is the sole and exclusive owner of all rights, title, and interest to the '218 Patent necessary to bring this action, including the right to recover past and future damages. Tempur-Pedic has owned all rights to the '218 Patent throughout the period of Defendants' infringement and still owns those rights. Defendants are not currently licensed to practice the '218 Patent. A true and correct copy of the '218 Patent is attached as Exhibit 1 and incorporated herein be reference.

13. The '218 Patent is valid and enforceable.

14. Defendants have imported into the United States, manufactured, used, marketed, offered for sale, and/or sold in the United States, leg spacer pillows that infringe the '218 Patent, or induce or contribute to the infringement of the '218 Patent.

15. Defendants' accused product which infringes one or more claims of the '218 Patent includes, but is not limited to, the Contour Butterfly 3 in 1 Massage Pillow ("the Accused Product").

16. At a minimum, and in accordance with 35 U.S.C. § 287, Defendants have had actual knowledge of the '218 Patent at least as early as the filing of this Original Complaint and/or the date this Original Complaint was served on Defendants.

17. Defendants have had actual notice of the '218 Patent since as early as December 9, 2008. Inventors Edmund Scott Davis and Antonio Arcieri, through counsel, filed U.S. Patent Application Serial No. 11/872,322 ("the '322 Application") on October 15, 2007 titled "Leg Pillow." The application identified Banyan as the assignee of the alleged invention. The '322 Application claimed the benefit of U.S. Provisional Patent Application Serial No. 60/829,478 filed October 13, 2006. The '322 Application published on April 24, 2008 under publication number 2008/0092297.

18. On December 9, 2008, the USPTO Examiner issued a Non-Final Rejection of the '322 Application (mail room date December 19, 2008). The Examiner rejected claims 7–12 of the '322 Application as anticipated under 35 U.S.C. § 102(b) by the '218 Patent:

<p>8. Claims 7-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Wassilefsky (US Patent No. 6,578,218).</p>
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19. The Examiner provided a complete analysis regarding how the '218 Patent anticipated the applicants' claims.

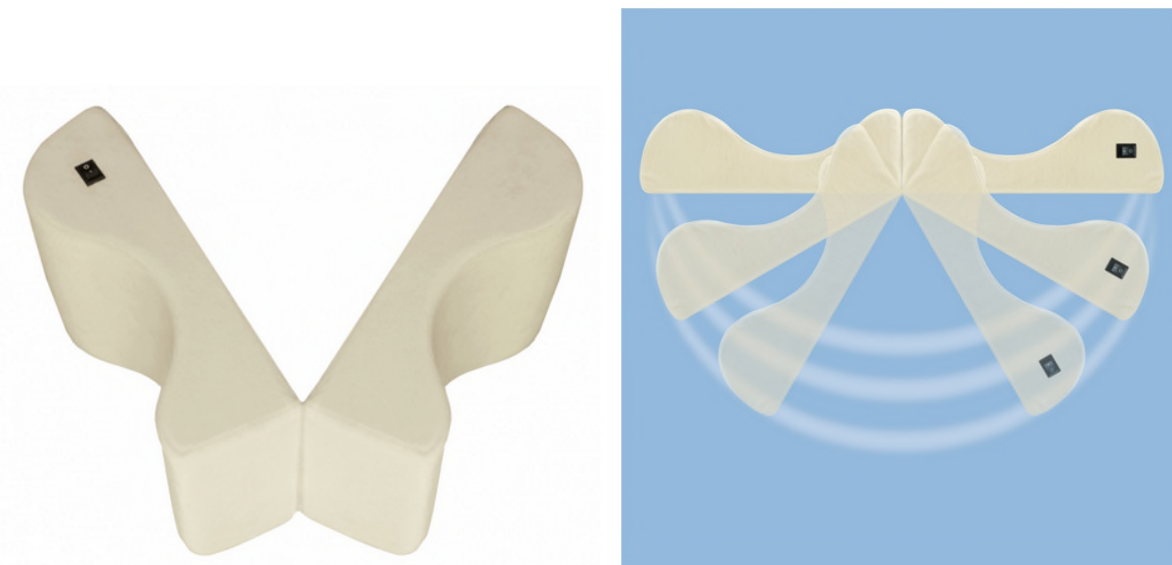
24. In light of the Examiner's rejection, the applicants did not further prosecute the '322 Application and did not file any response in opposition.

25. On July 13, 2009, the Examiner issued a Notice of Abandonment of the '322 Application.

26. Despite such notice of the '218 Patent, Defendants continue to make, use, import into, market, offer for sale, and/or sell in the United States products that infringe the '218 Patent.

27. The following figures are product images from Contour's interactive website (www.contourliving.com/contour-butterfly-3in1-massage-pillow/) reflecting the invention of the '218 Patent:

Contour Butterfly 3in1 Massage Pillow Contour Butterfly 3in1 Massage Pillow



28. The following product guide is from Contour's interactive website (<http://www.contourliving.com/product-guide-downloads/>) and reflects the invention of the '218 Patent:

CONTOUR
Butterfly 3in1 Massage Pillow

Innovative "hinge" design opens and closes pillow to solve multiple support problems.

- Add massage to any position with just the flip of a switch
- Memory foam molds to provide a custom fit
- Soft velour cover removes for machine washing

3-Way Use

Innovative Hinge Design

Contour Products, Inc.
4740-A Dwight Evans Road | Charlotte, NC 28217
www.contourliving.com
customerserv@contourliving.com | 800-950-0236 ext 2400

29. Defendants offer for sale and sell the infringing products on their interactive website (www.contourliving.com), through their eBay site, and through retailers, including Amazon.com, Target, Wal-Mart, Bed Bath & Beyond, QVC, and others.

30. In committing their acts of infringement, Defendants acted despite an objectively high likelihood that their actions constituted infringement of at least one valid claim, and Defendants actually knew or should have known that their actions constituted an unjustifiable high risk of infringement of at least one valid and enforceable claim.

31. Defendants' acts of infringement have caused damage to Tempur-Pedic. Tempur-Pedic is entitled to recover from Defendants the damages sustained by Tempur-Pedic as a result of Defendants' wrongful acts.

COUNT ONE: INFRINGEMENT OF THE '218 PATENT

32. Tempur-Pedic incorporates by reference the preceding paragraphs as if fully set forth herein.

33. Defendants infringe, either literally or under the doctrine of equivalents, contribute to the infringement of, and/or induce infringement of the '218 Patent by making, using, selling, offering for sale, or importing into the United States, or by intending others make, use, import into, offer for sale, or sell in the United States, products covered by one or more claims of the '218 Patent including, but not limited to, the Contour Butterfly 3 in 1 Massage Pillow. Further discovery may reveal additional infringing products and/or models.

34. Defendants, directly and/or through intermediaries, infringe one or more claims of the '218 Patent, including, but not limited to, claims 1, 3-4, 7-24, 26-29, as provided in 35 U.S.C. § 271(a). Defendants make, use, sell, offer for sale, and/or imports the Accused Product in this District and elsewhere in the United States, and thus directly infringes the '218 Patent, either literally or under the doctrine of equivalents.

35. Defendants, directly and/or through intermediaries, indirectly infringe the '218 Patent, including, but not limited to, claims 1, 3-4, 7-24, 26-29, as provided in 35 U.S.C. § 271(b), by inducing infringement, literally or under the doctrine of equivalents, by others such as manufacturers, resellers, distributors, retailers, and customers, in this District and elsewhere in the United States. Defendants intended to cause infringing acts by others. Defendants were aware of the '218 Patent and knew that the others' actions of making, using, importing,

providing, supplying, distributing, selling, or offering to sell, if taken, would constitute infringement of the patent. Alternatively, Defendants believed there was a high probability that others would infringe the patent-in-suit but remained willfully blind to the infringing nature of others' actions.

36. Defendants also, directly and/or through intermediaries, indirectly infringe the '218 Patent, including, but not limited to, claims 1, 3-4, 7-24, 26-29, as provided in 35 U.S.C. § 271(c), by contributing to infringement, literally or under the doctrine of equivalents, by others, such as manufacturers, resellers, distributors, retailers, and customers, in this District and elsewhere in the United States. The Accused Product and its components constitute a material part of the invention, are especially made or especially adapted for infringement of the '218 Patent, and are known by Defendants to have no substantial non-infringing uses. Alternatively, Defendants believed there was a high probability that others would infringe the patents-in-suit but remained willfully blind to the infringing nature of others' actions.

37. Defendants' infringement of the '218 Patent has been and continues to be willful. Upon information and belief, Defendants knew or should have known that they directly infringed and were causing others to directly infringe the '218 Patent. Defendants' prosecution of U.S. Patent Application Serial No. 11/872,322 put them on notice at least as early as December 9, 2008, when the Examiner rejected the '322 Application in light of the '218 Patent. Defendants also received notice of the '218 Patent at least as of the date this lawsuit was filed and/or the date this Original Complaint was served on Defendants.

38. Defendants' infringement of the '218 Patent has damaged and will continue to damage Tempur-Pedic.

ATTORNEYS' FEES

39. Tempur-Pedic is entitled to recover reasonable and necessary attorneys' fees under the applicable law.

DEMAND FOR JURY TRIAL

Tempur-Pedic hereby demands a jury trial for all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Tempur-Pedic respectfully requests that this Court enter judgment in its favor and grant the following relief:

- A. A judgment that Defendants have directly infringed the '218 Patent, contributorily infringed the '218 Patent, and induced the infringement of the '218 Patent;
- B. A judgment that that Defendants' infringement of the '218 Patent was willful, and that Defendants' continued infringement of the patent is willful;
- C. A preliminary and permanent injunction preventing Defendants, and their officers, directors, agents, servants, employees, attorneys, licensees, successors, and assigns, and those in active concern or participation with any of them, from directly infringing, contributorily infringing, or inducing the infringement of the '218 Patent;
- D. A ruling that this case be found to be exceptional under 35 U.S.C. § 285, and a judgment awarding Tempur-Pedic its attorneys' fees incurred in prosecuting this action;
- E. A judgment and order requiring Defendants pay Tempur-Pedic damages under 35 U.S.C. § 284, including supplemental damages for any continuing post-verdict infringement up until the entry of final judgment, with an accounting, as needed;
- F. A judgment and order requiring Defendants pay Tempur-Pedic the costs of this action;

- G. A judgment and order requiring Defendants pay Tempur-Pedic pre-judgment and post-judgment interest on the damages awarded;
- H. A judgment and order requiring that, in the event a permanent injunction preventing future acts of infringement is not granted, Plaintiffs be awarded a compulsory ongoing licensing fee; and
- I. Such other and further relief as the Court may deem just and proper.

Dated: March 31, 2015

Respectfully submitted,

/s/ Thad M. Barnes

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**ATTORNEYS FOR PLAINTIFF
TEMPUR-PEDIC MANAGEMENT, LLC**