

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION



KINETIC CONCEPTS, INC.

03-70135

Plaintiff,

Civil Action No. 02-
Hon.

v.

NANCY G. EDMUNDS

BOTSFORD GENERAL HOSPITAL,
TRI-COUNTY ORTHOPEDICS, P.C., and
ROBERT P. COLEN, D.O.,

MAGISTRATE JUDGE PEP

Defendants.

E. Powell Miller (39487) ✓
Martha J. Olijnyk (P60191) ✓
Miller Shea, P.C.
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FILED
2003 JAN 10 P 2:37
U.S. DIST. COURT OF TEXAS
EAST DISTRICT OF MICHIGAN
DETROIT

**ORIGINAL COMPLAINT FOR PATENT
INFRINGEMENT AND DEMAND FOR JURY TRIAL**

Plaintiff, Kinetic Concepts, Inc., by its attorneys Miller Shea, P.C. and for its Original
Complaint for Patent Infringement against Defendants, Botsford General Hospital, Tri-County
Orthopedics, P.C., and Robert P. Colen, D.O., for the infringement of U.S. Patent Nos.
5,645,081, 5,636,643 and 5,527,293, states as follows:

PARTIES

1. Plaintiff Kinetic Concepts, Inc. ("KCI") is a corporation organized under the laws
of the State of Texas having its principal place of business at 8023 Vantage Drive, San Antonio,
Texas, 78230.

2. Defendant Botsford General Hospital ("Botsford") is a corporation organized under the laws of the State of Michigan having its principal place of business at 28050 Grand River Ave., Farmington Hills, MI 48336.

3. Defendant Tri-County Orthopedics, P.C. ("Tri-County") is a professional corporation organized under the laws of the State of Michigan having a principal place of business at 28100 Grand River Ave., Ste. 209, Farmington Hills, MI 48336.

4. Upon information and belief, Defendant Robert Paul Colen, D.O. ("Dr. Colen") is an individual residing in Farmington Hills, MI. Dr. Colen is an orthopedic surgeon employed by Tri-County with a practice at 28100 Grand River Ave., Ste. 209, Farmington Hills, MI 48336.

JURISDICTION

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338 and the laws of the United States relating to patents, including 35 U.S.C. § 1, et al..

VENUE

6. Venue in this judicial District is proper pursuant to 28 U.S.C. §§ 1391(b)(1)-(2) and 1400(b) as all Defendants reside in this District and all or a substantial part of the acts and practices complained of herein occurred in this District.

CAUSE OF ACTION

7. KCI is the exclusive licensee of United States Letters Patent No. 5,645,081, entitled "METHOD OF TREATING TISSUE DAMAGE AND APPARATUS FOR THE SAME," issued July 8, 1997 (referred to as the "'081 Patent," attached as Exhibit A), and owned by Wake Forest University. KCI is expressly authorized to bring suit in its name alone.

8. The '081 Patent was duly and lawfully issued by the United States Patent and Trademark Office and is extant and enforceable.

9. KCI is the exclusive licensee of United States Letters Patent No. 5,636,643, entitled "WOUND TREATMENT EMPLOYING REDUCED PRESSURE," issued June 10, 1997 (referred to as the "'643 Patent," attached as Exhibit B), and owned by Wake Forest University. KCI is expressly authorized to bring suit in its name alone.

10. The '643 Patent was duly and lawfully issued by the United States Patent and Trademark Office and is extant and enforceable.

11. KCI is the owner by assignment of United States Letters Patent No. 5,527,293, entitled "FASTENING SYSTEM AND METHOD," issued June 18, 1996 (referred to as the "'293 patent," attached as Exhibit C), the assignment was duly recorded with the United States Patent and Trademark Office.

12. The '293 Patent was duly and lawfully issued by the United States Patent and Trademark Office and is extant and enforceable.

13. KCI has commercialized the inventions of the '081, '643, and '293 Patents through a highly successful product marketed as the V.A.C.[®] (Vacuum Assisted Closure[™]) system.

14. KCI's V.A.C.[®] system assists in wound closure and helps promote wound healing by applying localized sub-atmospheric pressure to the wound. V.A.C.[®] therapy is applied to a dressing positioned over the wound. The wound dressing helps promote the normal healing process.

15. Until the spring of 2002, Botsford rented use of the V.A.C.[®] system and associated equipment from KCI.

16. Dr. Colen held practice privileges at Botsford and used the V.A.C.[®] system on patients at Botsford.

17. During the spring of 2002, Botsford's Chief Financial Officer, David Marcellino, ordered physicians and hospital staff, including Dr. Colen, to discontinue using the V.A.C.[®] system.

18. In response to Mr. Marcellino's directive, Dr. Colen developed a makeshift device to apply localized sub-atmospheric pressure to the wounds of his patients. Dr. Colen's makeshift device comprises a Stryker canister connected by surgical tubing to a foam dressing inserted into the wound. A non-porous drape is applied to cover the foam and maintain sub-atmospheric pressure to the wound.

19. Dr. Colen applied his makeshift device to one or more patients at Botsford General Hospital.

20. On June 10, 2002, representatives of KCI met with Dr. Colen, Mr. Marcellino, and Botsford's Medical Director David P. Walters, D.O. to discuss Dr. Colen's use of the makeshift devices. There, Dr. Colen openly admitted his use of a makeshift device, described its composition, and demonstrated its operation.

21. Dr. Colen, with Botsford's express or implied approval, uses Dr. Colen's device as a substitute for KCI's V.A.C.[®] product.

22. Defendants directly compete with KCI in the vacuum-assisted wound healing market.

COUNT I - VIOLATIONS OF 35 U.S.C. § 271

23. Plaintiff realleges all preceding paragraphs.

24. Dr. Colen's makeshift device, when used in conjunction with a reduced pressure supply means such as a Stryker canister, infringes the '081, '643, and '293 Patents.

25. Defendants actively encourage the use of makeshift devices for the purpose of treating wounds in ways that induce infringement of and/or contributorily infringe the '081, '643, and '293 Patents.

26. Defendants are using and have used the makeshift devices and treatment methods/processes without KCI's authority.

27. Defendants continue to use the makeshift devices and treatment methods/processes after notice of their infringing acts by KCI.

28. Defendants are knowingly and directly infringing, inducing infringement, and/or contributorily infringing the claims of the '081, '643, and '293 Patents, without leave or license from KCI, all to KCI's substantial damage and Defendants will continue to do so unless enjoined from committing such infringing actions by this Court.

29. Said direct or contributory infringement of the claims of the '081, '643, and '293 Patents or the active inducement of others to infringe said Patents by Defendants is damaging KCI, and KCI will suffer additional and irreparable damage unless this Court enjoins Defendants from continuing to directly or contributorily infringe or inducing others to infringe the claims of said Patents.

30. Defendants are knowingly, willfully and intentionally directly infringing, inducing infringement of, or contributorily infringing, the claims of the '081, '643, and '293 Patents, making this an exceptional case and justifying the assessment of increased damages pursuant to 35 U.S.C. § 284 and the award of attorneys' fees pursuant to 35 U.S.C. § 285.

31.

RELIEF REQUESTED

WHEREFORE, KCI requests that this Court grant the following relief:

A. Preliminarily and permanently enjoin Defendants, their respective officers, agents, employees and all others in concert or participation with them from further acts of infringement or contributory infringement of the claims of U.S. Patent No. 5,645,081, U.S. Patent No. 5,636,643, and U.S. Patent No. 5,527,293, or inducing others to infringe the claims of those patents, pursuant to 35 U.S.C. § 283.

B. Award to KCI the actual damages, but not less than a reasonable royalty, it has incurred because of the acts by Defendants and their respective agents, representatives, or affiliates of infringement or contributory infringement or inducement of others to infringe the claims of U.S. Patent No. 5,645,081, U.S. Patent No. 5,636,643, and U.S. Patent No. 5,527,293, pursuant to 35 U.S.C. § 284.

C. Award to KCI increased damages because of the acts of Defendants and their respective agents, representatives, or affiliates of continued deliberate and willful infringement or contributory infringement or inducement of others to infringe the claims of U.S. Patent No. 5,645,081, U.S. Patent No. 5,636,643, and U.S. Patent No. 5,527,293, pursuant to 35 U.S.C. § 284.

D. Award to KCI its costs and reasonable attorneys fees incurred in connection with the institution and prosecution of this civil action, pursuant to 35 U.S.C. § 285.

E. Award to KCI such other and further relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury.

Respectfully Submitted,

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Attorneys for Plaintiff Kinetic Concepts, Inc.

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Dated: January 9, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

**SEE CASE FILE FOR
ADDITIONAL
DOCUMENTS OR PAGES
THAT WERE NOT
SCANNED**