

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CLEVELAND MEDICAL DEVICES INC., an	)	
Ohio Corporation,	)	
	)	
Plaintiff,	)	C.A. No. 22-794-GBW
	)	
v.	)	
	)	
RESMED INC., a Delaware Corporation,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF CLEVELAND MEDICAL DEVICES INC.’S
INITIAL INFRINGEMENT CONTENTIONS
AND INITIAL ELECTION OF ASSERTED CLAIMS**

Pursuant to Section 3(c) and (g) of the Court’s Scheduling Order (D.I. 40) and the Delaware Default Standard for Discovery, Section 4(c), Plaintiff Cleveland Medical Devices Inc. (“CleveMed”) provides the following Initial Infringement Contentions and Initial Election of Asserted Claims to Defendant ResMed Inc. (“ResMed”), including the initial claim charts attached hereto as Appendices A-K (the “Charts”). The Charts address each of the Asserted Claims and the accused products, as defined herein, of U.S. Patent Nos. 10,426,399 (the “’399 Patent”); 10,925,535 (the “’535 Patent”); 11,064,937 (the “’937 Patent”); 11,202,603 (the “’603 Patent”); 10,028,698 (the “’698 Patent”); 11,234,637 (the “’637 Patent”); and 10,076,269 (the “’269 Patent”) (collectively, the “Asserted Patents”)¹.

¹ CleveMed is no longer asserting U.S. Patent No. 10,478,118 (the “’118 Patent”).

CleveMed elects the following claims from the Asserted Patents (collectively, the “Asserted Claims”):

- ’399 Patent: Claims 1, 2, 3, 5, 8 and 11;
- ’535 Patent: Claims 8, 9 and 12;
- ’937 Patent: Claims 1, 2, 4, 9, 10, 13 and 17;
- ’603 Patent: Claims 1, 2, 7, 8, 9 and 13;
- ’698 Patent: Claims 14 and 15;
- ’637 Patent: Claims 1, 2, 4, 9 and 15; and
- ’269 Patent: Claims 1, 4, 5, 8, 9, 13, 15, 16, 17 and 18.

The products that infringe the ’399 Patent, the ’535 Patent, the ’937 Patent, the ’603 Patent, the ’698 Patent, and the ’637 Patent (collectively, the “Home Sleep Testing Patents” or “HST Patents”) include the following, as well as other ResMed products containing the infringing technologies (collectively, the “HST Accused Products”):

- ApneaLink Air; and
- ApneaLink Air with AirView.

ApneaLink PC Software is part of ApneaLink Air.

The products that infringe the ’269 Patent (also referred to as the “Positive Airway Pressure Patent” or “PAP Patent”) include the following, as well as other ResMed products containing the infringing technologies (collectively, the “PAP Accused Products”):

- AirMini device with AirMini App
- AirMini device with AirView;
- AirSense 10 CPAP, Elite, AutoSet, and AutoSet for Her devices (collectively “AirSense 10 Devices”);
- AirSense 10 Devices with Air 10 Oximetry Module

- AirSense 10 Devices with Air 10 Oximetry Module and ResScan;
- AirSense 10 Devices with Air 10 Oximetry Module and AirView;
- AirSense 10 Devices with AirView;
- AirSense 10 Devices with AirView and myAir;
- AirSense 11 CPAP, Elite, and AutoSet (collectively “AirSense 11 Devices”);
- AirSense 11 Devices with AirView;
- AirSense 11 Devices with myAir;
- AirCurve 10 S, ST, ST-A, VAuto, and ASV devices (collectively “AirCurve 10 Devices”);
- AirCurve 10 Devices with the Air 10 Oximetry Module;
- AirCurve 10 Devices with the Air 10 Oximetry Module and ResScan;
- AirCurve 10 Devices with the Air 10 Oximetry Module and AirView;
- AirCurve 10 Devices with AirView
- AirCurve 10 Devices with AirView and myAir;
- Stellar 100 and 150 devices (collectively “Stellar Devices”);
- Stellar Devices with the Connectivity Module and AirView;
- Astral 100 and 150 devices (collectively “Astral Devices”);
- Astral Devices with the Connectivity Module and AirView.

ResMed infringes the Asserted Patents both directly and indirectly. Specifically:

- With respect to claims 1, 2, 3, 5, 8 and 11 of the ‘399 Patent, ResMed directly infringes under 35 U.S.C. 271(a) by performing each of the steps of the claimed methods using the HST Accused Products, including as part of testing those products. ResMed further directly infringes by joint and/or divided infringement

because performance of all of the claimed method steps are attributable to ResMed, where ResMed directs and controls those who use the HST Accused Products (including healthcare professionals and/or patients) to perform one or more steps of the claimed methods, including pursuant to the terms of regulatory approval and requirements for the HST Accused Products; ResMed conditions use of the HST Accused Products and receipt of the benefits of their use on performance of one or more steps of the claimed methods and establishes how those steps should be performed; ResMed contracts with users to perform one or more steps of the claimed methods; and/or ResMed forms a joint enterprise with users (e.g., health care professionals) to perform one or more steps of the claimed methods.

- With respect to claims 1, 2, 4, 9, 10, 13 and 17 of the '937 Patent, claims 1, 2, 4, 9 and 15 of the '637 Patent, claims 8, 9 and 12 of the '535 Patent and claims 1, 2 and 7 of the '603, ResMed directly infringes under 35 U.S.C. 271(a) by making, using, selling offering for sale and importing the HST Accused Products. ResMed further directly infringes by joint and/or divided infringement because ResMed puts the claimed systems into service, controls the claimed systems as a whole and obtains benefit from them, and acts as the final assembler of the claimed systems. ResMed further contributorily infringes these claims under 35 U.S.C. 271(c) by selling, offering to sell and importing the HST Accused Products, where these products are a material component of the claimed systems, particularly made and adapted to be used with any other components of the claimed systems that may not be sold, offered for sale or imported by ResMed,

and not staple articles of commerce suitable for substantial noninfringing use.

ResMed had knowledge of the Asserted Patents, CleveMed's patented technology and its infringement since at least 2018.

- With respect to claims 8, 9 and 13 of the '603 Patent and claims 14 and 15 of the '698 Patent, ResMed directly infringes under 35 U.S.C. 271(a) by performing each of the steps of the claimed methods using the HST Accused Products, including as part of testing those products. ResMed further directly infringes by joint and/or divided infringement because performance of all of the claimed method steps are attributable to ResMed, where ResMed directs and controls those who use its products (including healthcare professionals and/or patients) to perform one or more steps of the claimed methods, including pursuant to the terms of regulatory approval and requirements for the HST Accused Products; ResMed conditions use of the HST Accused Products and receipt of the benefits of their use on performance of one or more steps of the claimed methods and establishes how those steps should be performed; ResMed contracts with users to perform one or more steps of the claimed methods; and/or ResMed forms a joint enterprise with users (e.g., health care professionals) to perform one or more steps of the claimed methods. ResMed further induces infringement of these claims under 35 U.S.C. 271(b) by encouraging users (e.g., health care professionals) to infringe by performing the claimed methods, for example, by marketing and promoting the HST Accused Products that use the methods and providing instructions and guidance on how to perform the methods, including pursuant to the terms of regulatory approval and requirements for the HST Accused Products.

ResMed had knowledge of the Asserted Patents, CleveMed's patented technology and its infringement since at least 2018.

- With respect to claims 1, 4, 5, 8, 9, 13, 15, 16, 17 and 18 of the '269 Patent, ResMed directly infringes under 35 U.S.C. 271(a) by making, using, selling offering for sale and importing the PAP Accused Products. ResMed further directly infringes by joint and/or divided infringement because ResMed puts the claimed systems into service, controls the claimed systems as a whole and obtains benefit from them and acts as the final assembler of the claimed systems. ResMed further contributorily infringes these claims under 35 U.S.C. 271(c) by selling, offering to sell and importing the PAP Accused Products, where these products are a material component of the claimed systems, particularly made and adapted to be used with any other components of the claimed systems that may not be sold, offered for sale or imported by ResMed, and not staple articles of commerce suitable for substantial noninfringing use. ResMed had knowledge of the Asserted Patents, CleveMed's patented technology and its infringement since at least 2018.

The Charts, which are incorporated herein by reference, constitute the "initial claim chart relating each known accused product to the asserted claims each such product allegedly infringes," pursuant to the Scheduling Order (D.I. 40, Section 3(c)). See also Default Standard for Discovery, Section 4(c). CleveMed asserts that at least the products identified as satisfying one or more claim elements in the Charts infringe one or more of the Asserted Claims as specified in those Charts. To the extent that ResMed contends that it does not literally infringe a claim, ResMed infringes under the doctrine of equivalents. The Charts are not limiting and

address the Asserted Claims without the benefit of full discovery. Any citations included in the Charts are exemplary only and not limiting. CleveMed has subdivided the Asserted Claims in the Charts to explain where the Accused Products meet each claim element. These subdivisions are not to be taken as an indication of the boundaries of claim elements with respect to the doctrine of equivalents or any other issue. In addition, the accused products may infringe the Asserted Claims in multiple ways. CleveMed reserves the right to provide an alternate claim mapping or infringement contentions for such accused products or other products and services.

CleveMed discloses these Initial Infringement Contentions (including the Charts) and Initial Election of Claims based upon information presently known and reasonably available to it as of this date. These disclosures are preliminary, as discovery is not complete and in the early stages in this action, and ResMed has not yet completed its production and disclosure of technical and other relevant discovery or made available any source code, there have been no depositions to date, claim construction has not yet occurred, and CleveMed's investigation is ongoing. To the maximum degree allowed by the Federal Rules of Civil Procedure, the Court's Local Rules, and any scheduling orders entered in this action, CleveMed reserves the right to amend, modify, supplement, or narrow as appropriate any portion of these Initial Infringement Contentions (including the Charts) and Election of Asserted Claims, including but not limited to the identification of asserted claims, products or services accused of infringement, and the bases and manner of infringement, as the extent of infringement becomes more fully known, the Court makes any relevant rulings, and the case develops over the course of discovery. CleveMed further reserves the right to supplement this disclosure in light of ResMed's contentions in this action, including ResMed's noninfringement positions. CleveMed further reserves the right to

rely upon the opinions of one or more experts in support of this disclosure in accordance with the Court's scheduling orders.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2023, a complete copy of the foregoing **PLAINTIFF CLEVELAND MEDICAL DEVICES INC.'S INITIAL INFRINGEMENT CONTENTIONS AND INITIAL ELECTION OF ASSERTED CLAIMS** was served via electronic mail upon the following counsel of record for Defendant ResMed Inc.:

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