

has standing to sue for infringement of, United States Patent Number 7,547,289 (hereinafter “the ‘289 Patent”) entitled “Shoulder Extension Control Device” which issued on June 16, 2009.

Exhibit 1.

3. ERMI was formerly incorporated in Georgia as ERMI, Inc. but, effective April 1, 2019, ERMI, Inc. was converted to become ERMI LLC. This conversion has been duly recorded with the United States Patent and Trademark Office with reference to the ‘289 Patent.

4. On information and belief, Defendant Graymont is an Illinois limited liability company with principal offices located at 1621 W. Carroll Avenue, Chicago, IL 60612.

5. On information and belief, Defendant Kinnick is an Illinois corporation with principal offices located at 1919 Midwest Road, Suite 105, Oakbrook, IL 60523.

6. On information and belief, Defendants have previously and are presently using, selling, offering for sale, leasing, and/or offering for lease, including in this district, products that infringe the ‘289 Patent. These products include the product known as the T-Rex Orbit for Shoulder (hereinafter the “Accused Device”). **Exhibit 2.**

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a) and (b) both because it involves a federal question and also because it involves patents.

8. Because the amount in controversy exceeds \$75,000, and because Plaintiff and Defendants are diverse parties, this Court also has original jurisdiction pursuant to 28 U.S.C. § 1332.

9. This Court has *in personam* jurisdiction over Defendant Graymont because Graymont is incorporated in this state, conducts business in this district, and is engaged in patent infringement in this district.

10. This Court has *in personam* jurisdiction over Defendant Kinnick because Kinnick resides in this state, conducts business in this district, and is engaged in patent infringement in this district.

11. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over all other claims asserted or that may be asserted that are so related to claims within the original jurisdiction of this action that they form part of the same case or controversy under Article III of the United States Constitution.

12. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400 because both Graymont and Kinnick are entities that have their principal places of business in this district and because a substantial part of the events giving rise to ERMI's claims occurred in this district, namely Defendants' using, selling, offering to sell, leasing, offering to lease, and/or distributing products that infringe the '289 Patent.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

The '289 Patent

13. Dr. Thomas P. Branch (hereinafter "Dr. Branch") is a board certified orthopedic surgeon practicing with TREX Orthopedics, P.C., d/b/a University Orthopaedic Clinic in Decatur, Georgia. TREX Orthopedics, P.C., was formed in May 1995. Dr. Branch has continually used the TREX Orthopedics name both internally and on letterhead and business cards since 1996.

14. Dr. Branch invented a new and useful Shoulder Extension Control device and method and filed a United States provisional application directed thereto on December 13, 2001.

15. One year later, on December 13, 2002, Dr. Branch filed a United States non-provisional application having serial number 10/318,988 (hereinafter the "Application"). The Application claimed priority to the provisional patent application.

16. Dr. Branch assigned the Application, and any patents issuing therefrom, to ERMI. The assignment included all rights under the patents including the right to sue for past infringement.

17. The Application published to the public on July 10, 2003.

18. Prosecution commenced in the United States Patent and Trademark Office ("Patent Office") and the Patent Office issued a first office action on January 13, 2006, in which Claims 1 through 6 of the Application were allowed and declared patentable by the Patent Office.

19. Prosecution continued as to the remaining claims in the Application. The Patent Office never rejected Claims 1 through 6.

20. On March 16, 2009, the Patent Office issued a notice of allowance indicating that Claims 1 through 6 remained allowable and that Claims 31 through 46 were also allowable.

21. The Patent Office issued United States Patent 7,547,289, the '289 Patent as shown in **Exhibit 1**, on June 16, 2009 with 22 total claims.

22. Exemplary Independent Claim 1 of the '289 Patent is directed to:

An apparatus for manipulating the shoulder joint of the left or right arm of a human user, said apparatus comprising:

a frame including spaced apart first and second mounting locations;

an arm carriage configured to manipulate said shoulder joint of said user, said arm carriage configured to be mounted to one of said first and second mounting locations of said frame;

a power unit configured to provide power upon control by said user, said power unit configured to be mounted to the other of said first and second mounting locations of said frame;

a linkage intermediate said arm carriage and said power unit, said linkage configured to transfer power from said power unit to said arm carriage;

said arm carriage, said power unit, and said linkage configured to allow said arm carriage and said power unit to be switched between said first and second mounting locations and operated in alternating modes, such that in a first operating mode said arm carriage can manipulate the right arm of said user, and such that in a second operating mode said arm carriage can manipulate the left arm of said user.

23. Exemplary Independent Claim 22 of the '289 Patent is directed to:

A method of manipulating the shoulder of a user while seated in a substantially upright position, said user having an upper arm and a forearm, said method comprising the steps of:

A) providing an apparatus itself comprising:

1) a frame;

2) a seat for a user to sit in such that said user can sit in said seat in said substantially upright sitting position while facing a direction substantially along a first axis, said axis being substantially horizontal;

3) an upper arm assembly pivotably mounted relative to said frame about a second axis, said second axis being substantially parallel to said first axis; and

4) a forearm assembly pivotably mounted relative to said upper arm assembly about a third axis and configured to capture the forearm of the user during manipulation of the arm of the user, said third axis being substantially orthogonal to said second axis;

B) securing the forearm of a user to said forearm assembly;

C) selectively discouraging relative movement of said forearm assembly with respect to said upper arm assembly while at the same time allowing said upper arm assembly and said forearm assembly to both pivot together relative to said frame about said second axis;

D) pivoting said upper arm assembly about said second axis relative to said frame while at the same time said relative movement of said forearm assembly with respect to said upper arm assembly is discouraged such that abduction/adduction of the shoulder is created;

E) selectively discouraging relative movement of said upper arm assembly with respect to said frame while at the same time allowing relative movement of said forearm assembly relative to said upper arm assembly and said frame about said third axis; and

F) pivoting said forearm assembly about said third axis with respect to said upper arm assembly and with respect to said frame while at the same time said relative movement of said upper arm assembly with respect to said frame is discouraged such that external rotation is created at said shoulder.

24. The First Maintenance Fee for the '289 Patent was paid on October 1, 2012.

25. The Second Maintenance Fee for the '289 Patent was paid on December 1, 2016.

26. The '289 Patent is valid and enforceable.

ERMI's Devices

27. ERMI is a company that manufactures and sells medical devices throughout the United States. The name ERMI is an acronym that stands for "End Range Motion Improvement."

28. Many of ERMI's devices are shown and cataloged on ERMI's website, www.getmotion.com.

29. ERMI advertises its products on its website, in videos, and in printed media.

30. One of these products is the ERMI Shoulder Flexionater® device which is designed to increase motion for those with restricted external rotation, abduction, flexion, and internal rotation. **Exhibit 3**.

31. ERMI has made in excess of 1,400 ERMI Shoulder Flexionater® devices.

32. The ERMI Shoulder Flexionater® devices are distributed directly by ERMI through a network of sales representatives across the country.

33. The ERMI Shoulder Flexionater® devices have been tested and the results of the testing have been published.

34. Each ERMI Shoulder Flexionater® device is covered by the claims of the '289 Patent and each device is marked with the '289 Patent number. **Exhibit 4**.

35. In addition to showing the images, descriptions, and videos of the ERMI Shoulder Flexionater® device on its website, ERMI exhibits the device at trade shows around the country.

Mr. Eduardo M. Marti Visits ERMI

36. Mr. Eduardo Marti (hereinafter "Mr. Marti") contacted ERMI on November 7, 2013 via email seeking to sell distribution rights to an unrelated product.

37. Mr. Marti met with ERMI on December 13, 2013 and visited Dr. Branch's office at TREX Orthopedic, P.C., d/b/a University Orthopaedic Clinic.

38. ERMI devices and related literature, including the ERMI Shoulder Flexionater® device and related literature, were on display at the University Orthopaedic Clinic during Mr. Marti's visit on December 13, 2013. Mr. Marti was exposed to both the TREX name and the ERMI Shoulder Flexionater® device during his visit.

T-Rex Rehab and T-Rex Accused Device

39. Following Mr. Marti's meeting with ERMI at the TREX Orthopedic, P.C., d/b/a University Orthopaedic Clinic in December 2013, Mr. Marti founded a company named T-Rex Rehab, LLC (hereinafter "Rehab") in May 2014.

40. Rehab is a Florida limited liability company which has the same address as Mr. Marti, namely 19274 South Hibiscus Street, Weston, Florida 33332.

41. On June 4, 2014, Mr. Marti filed United States provisional patent application 62/007,541 directed to a Powered Knee Exerciser. On August 27, 2014, Mr. Marti filed United States provisional patent application 62/042,399 directed to a 3 Axis Actuator Driven Therapy Shoulder Device. On March 18, 2015, Mr. Marti filed United States provisional patent application 62/134,633 directed to Knee and Shoulder Exercisers. Mr. Marti assigned each of these three provisional applications to Rehab.

42. Based on these provisional patent applications, Mr. Marti also filed several non-provisional patent applications.

43. During the prosecution of Mr. Marti's non-provisional patent applications, Mr. Marti filed Information Disclosure Statements which, *inter alia*, included citations to ERMI's website, www.getmotion.com. **Exhibit 5**.

44. One of the products made and distributed by Rehab is the Accused Device.

Exhibit 2.

45. On information and belief, Mr. Marti has been and is involved in the advertising activities of Rehab.

46. Rehab advertises the Accused Device on its website at <https://trexrehab.com/trex-orbit-for-shoulder/>.

47. Rehab's website includes citations to the same publications that tested and commented on the ERMI devices.

48. Rehab's advertisements, including those on its website, include videos showing the Accused Device being used by a person.

49. Rehab's advertisements include a commercial brochure (hereinafter the "brochure") which has been distributed to consumers. **Exhibit 6.**

50. In September 2015, a Georgia corporation named T-Rex Investment, Inc. (hereinafter "T-Rex Investment") was formed in Georgia.

51. On information and belief, T-Rex Investment was formed as an acquisition company for the purpose of acquiring Rehab.

52. On information and belief, on March 9, 2016, T-Rex Investment completed the purchase of at least a portion of Rehab's assets, which included certain patents, patent applications, and distribution channels related to the T-Rex products.

53. On information and belief, a Georgia corporation named OneDirect Health Network, Inc. purchased 77% of T-Rex Investment.

54. On information and belief, Mr. Marti maintains ownership of at least a portion of Rehab.

Graymont's Distribution of the Accused Device

55. On information and belief, Graymont is a current and/or former distributor of Rehab products including the Accused Device.

56. On information and belief, Graymont has in the past and/or presently sells, offers for sale, leases, and/or offers for lease Rehab's products, including the Accused Device, in Illinois, including in this district.

57. Graymont operates the website <https://www.graymontmedical.com>.

58. On information and belief, Graymont has demonstrated the Accused Device to customers and potential customers.

59. On information and belief, Graymont has distributed the Accused Device to customers.

60. On information and belief, Graymont is aware of Rehab's brochure, **Exhibit 6**, or others like it, which, in addition to showing the Accused Device, also shows a photograph of the ERMI Shoulder Flexionater® device, **Exhibit 3**.

61. On information and belief, Graymont has visited facilities, such as medical facilities, trade shows, or conferences, where the ERMI Shoulder Flexionater® device is used or displayed.

62. On information and belief, Graymont is familiar with the ERMI Shoulder Flexionater® device and has knowledge of and/or is willfully blind to the claims of the '289 Patent.

Kinnick's Distribution of the Accused Device

63. On information and belief, Kinnick is a distributor of Rehab products including the Accused Device.

64. On information and belief, Kinnick sells, offers for sale, leases, and/or offers for lease Rehab's products, including the Accused Device, in Illinois, including in this district.

65. Kinnick operates the website <https://www.kinnickmedical.com>.

66. On information and belief, Kinnick has demonstrated the Accused Device to customers and potential customers.

67. On information and belief, Kinnick has distributed the Accused Device to customers.

68. On information and belief, Kinnick is aware of the Rehab's brochure, **Exhibit 6**, or others like it, which, in addition to showing the Accused Device, also shows a photograph of the ERMI Shoulder Flexionater® device, **Exhibit 3**.

69. On information and belief, Kinnick has visited facilities, such as medical facilities, trade shows, or conferences, where the ERMI Shoulder Flexionater® device is used or displayed.

70. On information and belief, Kinnick is familiar with the ERMI Shoulder Flexionater® device and has knowledge of and/or is willfully blind to the claims of the '289 Patent.

COUNT I – WILLFUL DIRECT PATENT INFRINGEMENT

35 U.S.C. § 271(a)

71. ERMI hereby incorporates paragraphs 1 - 70 above as if fully set forth herein.

72. Defendants have directly infringed and continue to directly infringe at least Claims 1 and 22 of the '289 Patent through using, selling, distributing, leasing, offering for lease, and/or offering to sell and distribute the Accused Device.

73. The Accused Device embodies at least Claim 1 and Claim 22 of the '289 Patent.

74. Defendants have literally infringed and continue to literally infringe at least one claim of the '289 Patent.

75. Defendants have infringed and continue to infringe at least one claim of the '289 Patent pursuant to the Doctrine of Equivalents.

76. On information and belief, Defendants use and have used the Accused Device in demonstration of the device.

77. Defendants have willfully infringed and continue to willfully infringe the '289 Patent.

78. As a result of Defendants' unlawful activities, ERMI has suffered and will continue to suffer irreparable harm.

79. Defendants' infringement of the '289 Patent has injured and continues to injure ERMI in an amount to be proven at trial, but not less than a reasonable royalty.

COUNT II – INDIRECT PATENT INFRINGEMENT

35 U.S.C. § 271(b); 35 U.S.C. § 271(c)

80. ERMI hereby incorporates paragraphs 1 - 79 above as if fully set forth herein.

81. On information and belief, Defendants market, advertise, demonstrate, sell, distribute, lease, offer to lease, and offer to sell and distribute the Accused Device to third parties including doctors, medical practices, care facilities, and directly to end user patients.

82. Defendants have induced and continue to induce infringement of at least Claim 22 of the '289 Patent under 35 U.S.C. § 271(b).

83. In addition to directly infringing the '289 Patent, Defendants indirectly infringe by instructing, directing and/or requiring others, including doctors, medical practices, care facilities, and end user patients, to perform the steps of method Claim 22, either literally or under

the Doctrine of Equivalents, of the '289 Patent, where all of the steps of the method claim are performed by either Defendants or its customers, doctors, medical practices, care facilities, end user patients, or some combination thereof.

84. The patients directly infringe the '289 Patent by using the Accused Device to treat their shoulders.

85. The doctors, care providers, and medical practices also directly infringe the '289 patent by prescribing the Accused Devices to patients, by providing instructions on use to patients, and by controlling and directing patients' use of the Accused Device. Defendants have direct knowledge and/or are willfully blind to the fact that they are inducing others, including doctors, medical practices, care facilities, and end user patients, to infringe by practicing, either themselves or in conjunction with Defendants, method Claim 22 of the '289 Patent.

86. By advertising, distributing, leasing, and/or selling the Accused Devices to others, Defendants have knowingly and intentionally aided, abetted, and induced others to directly infringe at least one claim of the '289 Patent.

87. The Accused Device has no substantial non-infringing use.

88. By providing the accused products to others, Defendants have contributed and are contributing to the infringement by others of at least Claim 22 of the '289 Patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff ERMI LLC, by and through the undersigned, hereby respectfully asks the court to enter judgment against Defendants Kinnick and Graymont and their respective subsidiaries, affiliates, agents, servants, employees, and all persons in active concert or participation with them, granting the following relief:

A. An entry of judgment holding that Defendants have infringed and are infringing the '289 Patent and have induced infringement and are inducing infringement of the '289 Patent;

B. An injunction against Defendants and all those acting in concert with them, from using, making, selling, or offering to sell the Accused Device and all colorable imitations thereof;

C. An award to ERMI for the full amount of damages sustained, including, but not limited to, any and all damage remedies available pursuant to the patent laws of the United States, 35 U.S.C. §§ 271, *et. seq.*, which include, but are not limited to, lost profits and a reasonable royalty award;

D. A determination that Defendants' infringement has been willful, wanton, and deliberate and that the damages against it be increased up to treble on this basis or for any other basis in accordance with the law;

E. A finding that this case is exceptional and an award to ERMI of its costs and reasonable attorneys' fees, as provided by 35 U.S.C. § 285;

F. An accounting of all infringing sales and revenue together with all pre-judgment and post-judgment interest at the maximum allowable rate on the full compensatory and trebled amount awarded to ERMI, from the first date of infringement of the '289 Patent; and

G. Such further and additional relief this Court deems just and proper under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiff, ERMI LLC hereby demands trial by jury of all issues so triable.

This the 1st day of April, 2019.

Respectfully Submitted,

/s/ Mindi Richter (Illinois Bar No. 6283833)

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