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

<p>ICON HEALTH &amp; FITNESS, INC., a Delaware corporation,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>FITNESS EQUIPMENT SERVICES LLC, a Utah limited liability corporation, d/b/a SOLE FITNESS; SPIRIT MANUFACTURING, INC., a Arkansas corporation, d/b/a SPIRIT FITNESS PRODUCTS;</p> <p style="text-align: center;">Defendants.</p>	<p>Civil Action No. 2:10-cv-01264-PMW</p> <p style="text-align: center;"><b>COMPLAINT</b></p> <p style="text-align: center;">Jury Demanded</p> <p style="text-align: center;">Honorable Judge Paul M. Warner</p>
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Plaintiff ICON HEALTH & FITNESS, INC. (“ICON”) hereby complains against defendants, FITNESS EQUIPMENT SERVICES LLC d/b/a SOLE FITNESS (“Sole”) and SPIRIT MANUFACTURING, INC. d/b/a SPIRIT FITNESS PRODUCTS (“Spirit”) for the causes of action alleged as follows:

### **THE PARTIES**

1. ICON is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business located at 1500 South 1000 West, Logan, Utah 84321.

2. ICON alleges on information and belief that defendant Sole is a Utah limited liability corporation with its principal place of business located at 56 Exchange Place, Salt Lake City, Utah 84111.

3. ICON alleges on information and belief that defendant Spirit is an Arkansas corporation with its principal place of business located at 2601 Commerce Drive, Jonesboro, Arkansas 72401.

### **JURISDICTION AND VENUE**

4. This is a civil action for patent infringement arising under the patent laws of the United States, including 35 U.S.C. § 271, which gives rise to the remedies specified under 35 U.S.C. §§ 281, and 283–85.

5. This is a civil action for unfair competition arising under Utah Code Ann. § 13-5a-101, *et seq.*

6. This is a civil action for breach of contract, and related claims, pursuant to the laws of the State of Utah.

7. This court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a). This Court has related claim jurisdiction over state law claims pursuant to 28 U.S.C. § 1338(b) and 28 U.S.C. § 1367.

8. ICON alleges on information and belief that Sole has sold or contracted for the sale of infringing goods within the State of Utah, to ICON's injury, which relates to the claims asserted by ICON, and out of which ICON's claims, in part, arise.

9. On information and belief, Sole is the owner of the web site located at [www.soletreadmills.com](http://www.soletreadmills.com), which is available to persons within the State of Utah.

10. On information and belief, Sole advertises, markets, and sells its products through its web site, [www.soletreadmills.com](http://www.soletreadmills.com), which advertising, marketing, and selling are available to the purchasing public in the State of Utah.

11. This Court's exercise of personal jurisdiction over Sole is consistent with the Constitutions of the United States and the State of Utah.

12. Spirit has contracted with ICON, a Utah corporation, and has failed to fulfill its contractual obligations to ICON pursuant to a contract interpreted, governed, and enforced according to the laws of the State of Utah.

13. ICON alleges on information and belief that, in the alternative, Spirit has sold or contracted for the sale of infringing goods within the State of Utah, to ICON's injury, which relates to the claims asserted by ICON, and out of which ICON's claims, in part, arise.

14. On information and belief, Spirit is the owner of the web site located at [www.spiritfitness.com](http://www.spiritfitness.com), which is available to persons within the State of Utah.

15. On information and belief, Spirit advertises, markets, and sells its products through its web site, [www.spiritfitness.com](http://www.spiritfitness.com), which advertising, marketing, and selling are available to the purchasing public in the State of Utah.

16. This Court's exercise of personal jurisdiction over Spirit is consistent with the Constitutions of the United States and the State of Utah.

17. Venue is proper in this judicial district pursuant to, at least, 28 U.S.C. §§ 1391(b)(2), 1391(b)(3), 1391(c), and 1400(b).

### **FACTUAL BACKGROUND**

18. ICON is an award-winning innovator in the field of exercise equipment and markets and sells a variety of consumer products.

19. ICON came to its position of technological leadership through hard work and substantial investment in research and development. As a result of its endeavors, many of the technological innovations created and owned by ICON are protected by a valuable and diverse intellectual property portfolio that includes patents, trademarks, trade dress, and copyrights.

20. Many of ICON's technological innovations are protected, *inter alia*, by a portfolio of utility and design patents, including United States Patent No. 5,772,560 ("the '560 Patent"), a true and correct copy of which is attached hereto as Exhibit A.

21. ICON is the owner by assignment of the '560 Patent.

22. ICON has not licensed Sole to practice the '560 Patent, and Sole does not have any right or authority to license others to practice the '560 Patent.

23. ICON and Spirit entered into a written license agreement, effective as of April 1, 2000 (the "License Agreement"), a true and correct copy of which is attached hereto as Exhibit B.

24. The License Agreement states:

2.01 License. (i) ICON hereby grants to Spirit a nonexclusive license to use in any and all manner all of ICON's Licensed Patents, specifically

including the right to make, have made for it, import, export, market, distribute, sell, lease, license and otherwise dispose of, trade in or otherwise exploit Spirit's Licensed Products within the Licensed Territory, but not including the right to sublicense.

25. The License Agreement defines "ICON's Licensed Patents" to include, *inter alia*, the '560 Patent.

26. The License Agreement defined "Spirit's Licensed Products" as follows:

1.04. Spirit's Licensed Products. The term "Spirit's Licensed Products" shall mean any treadmill having a treadmill deck that is selectively moveable between an operating position, in which the treadmill deck provides a substantially flat or partially inclined surface for the user, and a storage position, in which the treadmill deck is stored in a substantially upright position, and which are manufactured by or for Spirit within the Licensed Territory or are imported distributed, marketed, sold, licensed, leased or otherwise disposed of by Spirit within a Licensed Territory, and which fall within the scope of one or more claims of any of ICON's Licensed Patents.

27. The License Agreement defines "Licensed Territory" to mean "any country pertaining to ICON's or Spirit's Licensed Patents."

28. Pursuant to the License Agreement, Spirit is required to submit quarterly royalty payments to ICON of (4%), of a total six percent (6%) royalty, for the Net Sales Proceeds of Spirit's Licensed Products.

29. The License Agreement defines "Net Sales Proceeds" as follows:

1.06. Net Sales Proceeds. The term "Net Sales Proceeds" shall mean the total gross sales realized by Spirit in the manufacture, importation, distribution, marketing, sale, licensing, leasing or other disposition of Spirit's Licensed Products to or for a third-party within the Licensed Territory, less rebates, co-op advertising, prepaid freight, sales discounts and transportation expenses, as determined under generally accepted accounting principles, applied on a consistent basis from period to period.

30. On information and belief, Spirit has failed to submit quarterly royalty payments to ICON as required by the License Agreement.

31. Section 7.07 of the License Agreement provides:

7.07. Attorneys' Fees. In the event that any party hereto shall be in default or breach of this Agreement, said party shall be liable to pay all reasonable attorneys' fees, court costs and other related collection costs and expenses incurred by the non-defaulting or non-breaching party in prosecuting its rights hereunder.

32. The License Agreement is expressly interpreted, governed, and enforced according to the laws of the State of Utah.

33. Spirit does not have any right or authority to license others to practice the '560 Patent.

34. ICON has incurred damages due to Spirit's failure to pay royalties pursuant to the License Agreement.

35. ICON alleges upon information and belief that Sole imports, makes, uses, sells, and/or offers for sale within the United States and within the State of Utah, either directly or through established distribution channels, exercise equipment, including treadmills designated as, *inter alia*, F63, F65, F80, F83, and F85.

36. On information and belief, Sole has sold products that infringe the '560 Patent, including, for example, the treadmills designated as F63, F65, F80, F83, and F85.

37. Spirit, through its agents, has previously represented to ICON that Spirit is the exclusive manufacturer of treadmills marketed by Sole.

38. On information and belief, ICON has not received royalty payments from Spirit for treadmills manufactured by Spirit for Sole.

39. On information and belief, Sole has sold treadmills that infringe the '560 Patent that have not been the subject of royalty payments from Spirit to ICON.

40. The License Agreement requires Spirit to place appropriate legal proprietary markings on Spirit's Licensed Products.

41. On information and belief, Sole's infringing treadmills, including at least the treadmills designated as F65, F80 and F85, do not include the appropriate legal proprietary markings that Spirit is required to place on Spirit's Licensed Products.

42. By reason of the conduct of both Spirit and Sole as set forth hereinabove and on information and belief, Spirit is not the exclusive manufacturer of treadmills that infringe the '560 Patent and that are marketed by Sole.

43. In the event that the License Agreement is found unenforceable, ICON has not licensed Spirit to practice the '560 Patent.

44. ICON alleges upon information and belief that Spirit imports, makes, uses, sells, and offers for sale within the United States and within the State of Utah, either directly or through established distribution channels, strength training exercise equipment, including equipment designated as, *inter alia*, the XT285 Treadmill, the XT385 Treadmill, and the XT485 Treadmill.

45. In the event that the License Agreement is found unenforceable and on information and belief, Spirit has sold products that infringe the '560 Patent, including, for example, the XT285 Treadmill, the XT385 Treadmill, and the XT485 Treadmill.

**FIRST CAUSE OF ACTION**  
**(Patent Infringement of the '560 Patent Against Sole)**

46. By this reference ICON realleges and incorporates the foregoing paragraphs as though fully set forth herein.

47. ICON alleges on information and belief that Sole has infringed one or more claims of the '560 Patent by making, using, selling, offering for sale within the United States, or importing into the United States systems and products that embody one or more of the claims of the '560 Patent, or by contributing to infringement, inducing others to infringe the '560 Patent, or carrying out acts constituting infringement under 35 U.S.C. § 271.

48. The conduct of Sole as set forth hereinabove gives rise to a cause of action for infringement of the '560 Patent, pursuant to at least 35 U.S.C. §§ 271 and 281.

49. On information and belief, Sole has sold infringing products, including, for example, the treadmills identified as F63, F65, F80, F83, and F85, despite an objectively high likelihood that its actions constitute infringement.

50. On information and belief, Sole's sales of infringing products have been both willful and deliberate.

51. By reason of the foregoing, ICON is entitled to monetary relief against Sole, pursuant to 35 U.S.C. §§ 284–85, as more fully set forth herein below.

**SECOND CAUSE OF ACTION**  
**(Unfair Competition Against Sole)**

52. By this reference ICON realleges and incorporates the foregoing paragraphs as though fully set forth herein.



53. Sole, by its actions set forth hereinabove, has engaged in intentional business acts or practices that are unlawful, unfair, and/or fraudulent and that have caused a material diminution in the value of the '560 Patent, in violation of, *inter alia*, Utah Code Ann. § 13-5a-102(4).

54. Sole's conduct as set forth hereinabove gives rise to a cause of action for unfair competition and related wrongs under the statutory and common law of the State of Utah and other states, including at least Utah Code Ann. § 13-5a-101, *et seq.*

55. By reason of the foregoing, ICON has suffered damages and irreparable harm.

56. By reason of the foregoing, ICON is entitled to actual and punitive damages from Sole, along with its attorneys' fees and costs pursuant to at least Utah Code Ann. § 13-5a-103(1)(b) as more fully set forth hereinbelow.

**THIRD CAUSE OF ACTION  
(Breach of Contract Against Spirit)**

57. By this reference ICON realleges and incorporates the foregoing paragraphs as though fully set forth herein.

58. The License Agreement is a valid and binding contract.

59. ICON has performed, and continues to perform, all of its obligations under the License Agreement.

60. Spirit has breached the License Agreement, and continues to breach the License Agreement by at least failing to pay royalties on all Licensed Products that fall within the scope of one or more claims of the '560 Patent.

61. Spirit's breach of the License Agreement is material and without justification.

62. As a direct and proximate result of Spirit's breach, ICON has suffered, and will continue to suffer general and consequential damages in an amount to be proven at trial.

63. Pursuant to section 7.07 of the License Agreement, ICON is also entitled to recover all costs and expenses, including reasonable attorneys' fees, it has incurred and will incur in connection with the parties' dispute and ICON's pursuit of its remedies under the License Agreement.

**FOURTH CAUSE OF ACTION  
(Alternative Claim of Patent Infringement of the '560 Patent Against Spirit)**

64. By this reference ICON realleges and incorporates the foregoing paragraphs as though fully set forth herein.

65. In the event that the License Agreement is not found to be a valid and binding contract, ICON alleges on information and belief that Spirit has infringed one or more claims of the '560 Patent by making, using, selling, offering for sale within the United States, or importing into the United States systems and products that embody one or more of the claims of the '560 Patent, or by contributing to infringement, inducing others to infringe the '560 Patent, or carrying out acts constituting infringement under 35 U.S.C. § 271.

66. The conduct of Spirit as set forth hereinabove gives rise to a cause of action for infringement of the '560 Patent, pursuant to at least 35 U.S.C. §§ 271 and 281.

67. To the extent that Spirit, under either knowledge or belief that the License Agreement is not valid or enforceable, has sold infringing products, including, for example, the XT285 Treadmill, the XT385 Treadmill, and the XT485 Treadmill, despite an objectively high likelihood that its actions constitute infringement, Spirit's actions have been both willful and deliberate.

68. By reason of the foregoing, ICON is entitled to monetary relief against Spirit, pursuant to 35 U.S.C. §§ 284–85, as more fully set forth herein below.

**FIFTH CAUSE OF ACTION  
(Alternative Claim of Unfair Competition Against Spirit)**

69. By this reference ICON realleges and incorporates the forgoing paragraphs as though fully set forth herein.

70. Spirit, by its actions set forth hereinabove, has engaged in intentional business acts or practices that are unlawful, unfair, and/or fraudulent and that have caused a material diminution in the value of the '560 Patent, in violation of, *inter alia*, Utah Code Ann. § 13-5a-102(4).

71. Spirit's conduct as set forth hereinabove gives rise to a cause of action for unfair competition and related wrongs under the statutory and common law of the State of Utah and other states, including at least Utah Code Ann. § 13-5a-101, *et seq.*

72. By reason of the foregoing, ICON has suffered damages and irreparable harm.

73. By reason of the foregoing, ICON is entitled to actual and punitive damages from Spirit, along with its attorneys' fees and costs pursuant to at least Utah Code Ann. § 13-5a-103(1)(b) as more fully set forth hereinbelow.

**PRAYER FOR RELIEF**

WHEREFORE, ICON prays for judgment as follows:

- A. A judgment finding Sole liable for infringement of the '560 Patent;
- B. An order of this Court temporarily, preliminarily, and permanently enjoining Sole, its agents, servants, and any and all parties acting in concert with any of them, from

directly or indirectly infringing in any manner or contributing in any manner to the infringement of the '560 Patent, pursuant to at least 35 U.S.C. § 283;

C. For an award of actual damages from Spirit, including general and consequential damages, in an amount according to proof, plus interest which continues to accrue thereon;

D. For an order and award of specific performance affirmatively requiring Spirit to honor the terms of the License Agreement by paying royalties going forward on all Licensed Products that fall within the scope of one or more claims of the '560 Patent.

E. For all attorneys' fees, expenses, and costs incurred in an amount according to proof pursuant to section 7.07 of the License Agreement.

F. A judgment finding Spirit liable for infringement of the '560 Patent;

G. An order of this Court temporarily, preliminarily, and permanently enjoining Spirit, its agents, servants, and any and all parties acting in concert with any of them, from directly or indirectly infringing in any manner or contributing in any manner to the infringement of the '560 Patent, pursuant to at least 35 U.S.C. § 283;

H. An award of damages to ICON for infringement of the '560 Patent, in an amount to be proven at trial, pursuant to at least 35 U.S.C. § 284;

I. An award of treble ICON's damages, pursuant to at least 35 U.S.C. § 284;

J. An award of actual and punitive damages pursuant to Utah Code Ann. § 13-5a-103(b);

K. An award of ICON's costs in bringing this action, pursuant to at least 35 U.S.C. § 284; and applicable state statutory and common law, including at least Utah Code Ann. §§ 13-5a-103(1)(b)(ii);

L. An award of ICON's attorneys' fees, pursuant to applicable state statutory and common law, including at least Utah Code Ann. §§ 13-5a-103(1)(b)(ii);

M. A declaration that this is an exceptional case and that ICON be awarded its attorneys' fees and expenses, pursuant to at least 35 U.S.C. § 285;

N. An imposition of constructive trust on, and an order requiring a full accounting of, the sales made by Sole as a result of its wrongful or infringing acts alleged herein;

O. An imposition of constructive trust on, and an order requiring a full accounting of, the sales made by Spirit as a result of its wrongful or infringing acts alleged herein;

P. Prejudgment interest, pursuant to at least 35 U.S.C. § 284;

Q. Post-judgment interest, pursuant to at least 28 U.S.C. § 1961(a); and

R. For such other and further relief as the Court deems just and equitable.

### **DEMAND FOR JURY TRIAL**

ICON demands trial by jury on all claims and issues so triable.

DATED December 21, 2010.

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By:           /s/ David R. Wright            
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