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17 Attorneys for Plaintiff ERMI LLC

18 **UNITED STATES DISTRICT COURT**  
19 **SOUTHERN DISTRICT OF CALIFORNIA**

20 ERMI LLC, a Delaware limited liability  
21 company,

22 Plaintiff,

23 vs.

24 SPORTSTEK MEDICAL, INC., a  
25 California corporation; and DANE  
26 JENSEN, an individual,

27 Defendants.

Case No. '19CV0608 WQHLL

**COMPLAINT FOR PATENT  
INFRINGEMENT, INJUNCTIVE  
RELIEF, AND DEMAND FOR JURY  
TRIAL**

Complaint Filed:  
Trial Date:

28 Plaintiff ERMI LLC (hereinafter "ERMI" or "Plaintiff"), in support of this  
Complaint against Defendants Sportstek Medical, Inc. (hereinafter "Sportstek") and  
Dane Jensen (hereinafter "Mr. Jensen") (collectively "Defendants"), does hereby allege  
as follows:

1 **NATURE OF THE ACTION**

2 1. Plaintiff ERMI brings this action for willful patent infringement pursuant  
3 to the Patent Act, 35 U.S.C. § 101, *et seq.*, and includes claims for damages and  
4 injunctive relief under §§ 154, 281, 283-285 of that Title.

5 **THE PARTIES**

6 2. Plaintiff ERMI is a Delaware limited liability company with its principal  
7 offices located at 441 Armour Place NE, Atlanta, Georgia, 30324. ERMI holds legal  
8 ownership of, and has standing to sue for infringement of, United States Patent Number  
9 7,547,289 (hereinafter “the ‘289 Patent”) entitled “Shoulder Extension Control Device”  
10 which issued on June 16, 2009. **Exhibit 1.**

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

15 4. On information and belief, Defendant Mr. Jensen is an individual with a  
16 personal residence in this district.

17 5. Mr. Jensen is a sales representative associated with Defendant Sportstek.

18 6. On information and belief, Defendant Sportstek is a California corporation  
19 with principal offices located at 27383 Via Industria, Temecula, California 92590.

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

24 **JURISDICTION AND VENUE**

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

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1 9. Because the amount in controversy exceeds \$75,000, and because Plaintiff  
2 and Defendants are diverse parties, this Court also has original jurisdiction pursuant to  
3 28 U.S.C. § 1332.

4 10. This Court has *in personam* jurisdiction over Defendant Sportstek because  
5 Sportstek is incorporated in this state, conducts business in this district, and is engaged  
6 in patent infringement in this district.

7 11. This Court has *in personam* jurisdiction over Defendant Mr. Jensen  
8 because Mr. Jensen resides in this state, conducts business in this district, and is  
9 engaged in patent infringement in this district.

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

14 13. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and  
15 1400 because Sportstek is an entity that has its principal places of business in this  
16 district and Mr. Jensen is associated with Sportstek, and because a substantial part of  
17 the events giving rise to ERMI's claims occurred in this district, namely Defendants'  
18 using, selling, offering to sell, leasing, offering to lease, and/or distributing products  
19 that infringe the '289 Patent.

20 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

21 ***The '289 Patent***

22 14. Dr. Thomas P. Branch (hereinafter "Dr. Branch") is a board certified  
23 orthopedic surgeon practicing with TREX Orthopedics, P.C., d/b/a University  
24 Orthopaedic Clinic in Decatur, Georgia. TREX Orthopedics, P.C., was formed in May  
25 1995. Dr. Branch has continually used the TREX Orthopedics name both internally and  
26 on letterhead and business cards since 1996.

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

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

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

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

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

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

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

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

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

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

25                         a frame including spaced apart first and second mounting locations;

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

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

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

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

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

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

16 A) providing an apparatus itself comprising:

17 1) a frame;

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

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

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

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

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

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

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

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

17 25. The First Maintenance Fee for the '289 Patent was paid on October 1,  
18 2012.

19 26. The Second Maintenance Fee for the '289 Patent was paid on December 1,  
20 2016.

21 27. The '289 Patent is valid and enforceable.

22 ***ERMI's Devices***

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

26 29. Many of ERMI's devices are shown and cataloged on ERMI's website,  
27 [www.getmotion.com](http://www.getmotion.com).

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1 30. ERMI advertises its products on its website, in videos, and in printed  
2 media.

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

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

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

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

11 35. Each ERMI Shoulder Flexionater® device is covered by the claims of the  
12 ‘289 Patent and each device is marked with the ‘289 Patent number. **Exhibit 4.**

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

16 ***Mr. Eduardo M. Marti Visits ERMI***

17 37. Mr. Eduardo Marti (hereinafter “Mr. Marti”) contacted ERMI on  
18 November 7, 2013 via email seeking to sell distribution rights to an unrelated product.

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

21 39. ERMI devices and related literature, including the ERMI Shoulder  
22 Flexionater® device and related literature, were on display at the University  
23 Orthopaedic Clinic during Mr. Marti’s visit on December 13, 2013. Mr. Marti was  
24 exposed to both the TREX name and the ERMI Shoulder Flexionater® device during  
25 his visit.

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1 *T-Rex Rehab and T-Rex Accused Device*

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

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

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

13 43. Based on these provisional patent applications, Mr. Marti also filed several  
14 non-provisional patent applications.

15 44. During the prosecution of Mr. Marti's non-provisional patent applications,  
16 Mr. Marti filed Information Disclosure Statements which, *inter alia*, included citations  
17 to ERMI's website, [www.getmotion.com](http://www.getmotion.com). **Exhibit 5.**

18 45. One of the products made and distributed by Rehab is the Accused Device.  
19 **Exhibit 2.**

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

22 47. Rehab advertises the Accused Device on its website at  
23 <https://trexrehab.com/t-rex-orbit-for-shoulder/>.

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

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

28 ///



1 50. Rehab’s advertisements include a commercial brochure (hereinafter the  
2 “brochure”) which has been distributed to consumers. **Exhibit 6.**

3 51. In September 2015, a Georgia corporation named T-Rex Investment, Inc.  
4 (hereinafter “T-Rex Investment”) was formed in Georgia.

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

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

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

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

14 *Sportstek’s Distribution of the Accused Device*

15 56. On information and belief, Sportstek is a distributor of Rehab products  
16 including the Accused Device.

17 57. On information and belief, Sportstek sells, offers for sale, leases, and/or  
18 offers for lease Rehab’s products, including the Accused Device, in California,  
19 including in this district.

20 58. Mr. Jensen is associated with Sportstek as a regional sales person in San  
21 Diego having the title of “DEX Rep.”

22 59. Sportstek operates the website [www.sportstekmedical.com](http://www.sportstekmedical.com).

23 60. On information and belief, Sportstek and Mr. Jensen have demonstrated  
24 the Accused Device to customers and potential customers.

25 61. On information and belief, Sportstek and Mr. Jensen have distributed the  
26 Accused Device to customers.

27 62. On information and belief, Sportstek and Mr. Jensen are aware of Rehab’s  
28 brochure, **Exhibit 6**, or others like it, which, in addition to showing the Accused

1 Device, also shows a photograph of the ERMI Shoulder Flexionater® device, **Exhibit**  
2 **3.**

3 63. On information and belief, Sportstek and Mr. Jensen have visited facilities,  
4 such as medical facilities, trade shows, or conferences, where the ERMI Shoulder  
5 Flexionater® device is used or displayed.

6 64. On information and belief, Sportstek and Mr. Jensen are familiar with the  
7 ERMI Shoulder Flexionater® device and have knowledge of and/or are willfully blind  
8 to the claims of the '289 Patent.

9  
10 **COUNT I – WILLFUL DIRECT PATENT INFRINGEMENT**

11 **(Against All Defendants)**

12 *35 U.S.C. §271(a)*

13 65. ERMI hereby incorporates paragraphs 1 - 64 above as if fully set forth  
14 herein.

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

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

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

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

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

26 71. Defendants have willfully infringed and continue to willfully infringe the  
27 '289 Patent.

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

3 73. Defendants' infringement of the '289 Patent has injured and continues to  
4 injure ERMI in an amount to be proven at trial, but not less than a reasonable royalty.  
5

6 **COUNT II – INDIRECT PATENT INFRINGEMENT**

7 **(Against All Defendants)**

8 ***35 U.S.C. §271(b); 35 U.S.C. §271(c)***

9 74. ERMI hereby incorporates paragraphs 1 - 73 above as if fully set forth  
10 herein.

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

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

17 77. In addition to directly infringing the '289 Patent, Defendants indirectly  
18 infringe by instructing, directing and/or requiring others, including doctors, medical  
19 practices, care facilities, and end user patients, to perform the steps of method Claim  
20 22, either literally or under the Doctrine of Equivalents, of the '289 Patent, where all of  
21 the steps of the method claim are performed by either Defendants or its customers,  
22 doctors, medical practices, care facilities, end user patients, or some combination  
23 thereof.

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

26 79. The doctors, care providers, and medical practices also directly infringe  
27 the '289 patent by prescribing the Accused Devices to patients, by providing  
28 instructions on use to patients, and by controlling and directing patients' use of the

1 Accused Device. Defendants have direct knowledge and/or are willfully blind to the  
2 fact that they are inducing others, including doctors, medical practices, care facilities,  
3 and end user patients, to infringe by practicing, either themselves or in conjunction with  
4 Defendants, method Claim 22 of the '289 Patent.

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

8 81. The Accused Device has no substantial non-infringing use.

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

12  
13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff ERMI LLC, by and through the undersigned, hereby  
15 respectfully asks the court to enter judgment against Defendants Sportstek and Mr.  
16 Jensen and their respective subsidiaries, affiliates, agents, servants, employees, and all  
17 persons in active concert or participation with them, granting the following relief:

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

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

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

28 ///

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

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

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

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

12 Dated: April 1, 2019

13 CALL & JENSEN  
14 A Professional Corporation  
15 Scott P. Shaw  
16 Aaron L. Renfro

17 By: /s/ Aaron L. Renfro  
18 Aaron L. Renfro

19 Attorneys for Plaintiff ERMI LLC  
20 Email: arenfro@calljensen.com

21 **DEMAND FOR JURY TRIAL**

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

23 Dated: April 1, 2019

24 CALL & JENSEN  
25 A Professional Corporation  
26 Scott P. Shaw  
27 Aaron L. Renfro

28 By: /s/ Aaron L. Renfro  
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