



Provided by:
Overhauser Law Offices LLC
www.iniplaw.org
www.overhauser.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA**

_____)	
ERMI LLC,)	
)	
Plaintiff,)	
)	Civil Action No. 1:19-cv-4628
vs.)	
)	
CLYDE PEACH, JR., d/b/a INDIANA BRACE)	JURY TRIAL DEMANDED
CO INC., d/b/a, CLYDE PEACH LLC,)	
d/b/a PEACH MEDICAL LLC,)	
)	
Defendant.)	
_____)	

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff ERMI LLC (hereinafter “ERMI” or “Plaintiff”), in support of this Complaint against Defendant Clyde Peach, Jr. (hereinafter “Mr. Peach”) d/b/a Indiana Brace Co Inc. (hereinafter “Indiana Brace”), Clyde Peach LLC (hereinafter “Peach LLC”), and Peach Medical, LLC (hereinafter “Peach Medical,” collectively “Defendants”) does hereby allege as follows:

NATURE OF THE ACTION

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

2. Plaintiff ERMI also brings this action for violation of the Patent Marking Statute 35 U.S.C. §292 and includes claims for damages adequate to compensate for the injury to ERMI.

THE PARTIES

3. Plaintiff ERMI is a Delaware limited liability company with its principal offices located at 441 Armour Place NE, Atlanta, Georgia 30324. ERMI holds legal ownership of, and has standing to sue for infringement of, United States Patent Number 6,669,660 (hereinafter “the ‘660 Patent”) entitled “Orthotic Apparatus and Method for Using Same” which issued on December 30, 2003. **Exhibit 1**.

4. 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 ‘660 Patent.

5. On information and belief, Defendant Mr. Peach is an individual residing at 6063 Spring Mill Road, Indianapolis, IN 46228-1440.

6. On information and belief, Mr. Peach has conducted business as each of the other Defendants: Indiana Brace, Peach LLC, and Peach Medical.

7. On information and belief, Defendant Indiana Brace was an Indiana corporation with offices located at 1815 N. Capitol Ave, Indianapolis, IN 46202. However, Indiana Brace was administratively dissolved on October 31, 2000.

8. On information and belief, Defendant Peach LLC was an Indiana limited liability company located at 55 Monument Circle, Suite 827, Indianapolis, IN 46204. However, Peach LLC was administratively dissolved on July 5, 2018.

9. On information and belief, Defendant Peach Medical was an Indiana limited liability company located at 501 W 62nd Street, Indianapolis, IN 46260. However, Peach Medical was voluntarily dissolved on December 31, 2012.

10. On information and belief, Mr. Peach was the principal in each of Indiana Brace, Peach LLC, and Peach Medical.

11. On information and belief, upon dissolution of each of Indiana Brace, Peach LLC, and Peach Medical, the assets of each passed to Mr. Peach.

12. On information and belief, Defendants have used, sold, offered for sale, leased, and/or offered to lease, including in this district, products that infringe the '660 Patent. These infringing products include the "Clyde's TKE Terminal Knee Extender" (hereinafter the "Accused Device"). **Exhibit 2.**

JURISDICTION AND VENUE

13. 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.

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

15. This Court has *in personam* jurisdiction over Mr. Peach because Mr. Peach resides in this state, conducts business in this district, and has engaged in patent infringement in this district. Additionally, each of Mr. Peach's dissolved businesses, namely Indiana Brace, Peach LLC, and Peach Medical were Indiana entities with registered addresses in this district.

16. 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.

17. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400 because Mr. Peach resides 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 '660 Patent.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

The '660 Patent

18. Dr. Thomas P. Branch (hereinafter "Dr. Branch") is a board certified orthopedic surgeon practicing with TREX Orthopedics, P.C., in Decatur, Georgia. TREX Orthopedics, P.C., was formed in May 1995.

19. Dr. Branch invented a new and useful Orthotic Apparatus and Method for Using Same and filed several United States provisional applications directed thereto on August 10, 1998 (hereinafter the "Provisional Applications").

20. One year later, on August 10, 1999, Dr. Branch filed an international Patent Cooperation Treaty Application number PCT/US99/18074 (hereinafter the "PCT Application").

21. On February 8, 2001, Dr. Branch filed a continuation patent application having serial number 09/779,329 tracing priority to the PCT application (hereinafter the "'329 Application").

22. Dr. Branch assigned all of the Provisional Applications, the PCT Application, the '329 Application, and any patents issuing therefrom, to ERMI. That assignment included all rights under the patents including the right to sue for past infringement.

23. The '329 Application published to the public August 30, 2001.

24. Prosecution commenced in the United States Patent and Trademark Office (“Patent Office”). The ’329 Application ultimately issued as the ’660 Patent on December 30, 2003. **Exhibit 1.**

25. The ’660 Patent issued with forty-four (44) total claims.

26. The First Maintenance Fee for the ’660 Patent was timely paid on or before the last day to pay of December 31, 2007.

27. The Second Maintenance Fee for the ’660 Patent was timely paid on or before the last day to pay of December 30, 2011.

28. The Third Maintenance Fee for the ’660 Patent was timely paid on or before the last day to pay of December 30, 2015.

29. The ’660 Patent expired on August 10, 2019.

30. Exemplary Independent Claim 1 of the ’660 Patent is directed to:

1. An orthotic device for providing motion to a user’s limb through movement of a joint, said device comprising:

a strap;

an inflatable member connected to said strap and including an inflatable bladder, said inflatable member, when in place, being spaced from said joint and proximate to said limb; and

a device operatively associated with said inflatable bladder for inflating and deflating said inflatable member such that as said inflatable member is inflated, said strap is placed in increasing tension so as to cause said limb to move partially along the length of said strap and causing said joint to be moved.

ERMI’s Devices

31. 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.”

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

33. ERMi advertises its products on its website, in videos, and in printed media including at <https://www.ermi-motion.com/program/knee/>. One of these products is the ERMi Knee Extensionater® device which is a portable, easy-to-use device that uses patented pneumatic air bladder technology to create overpressure to treat motion loss. By way of one example, the Knee Extensionater® allows a patient to recreate the proper body alignment and force used by physical therapists to increase knee motion and get back to normal function faster following surgery. **Exhibit 3.**

34. The ERMi Knee Extensionater® devices are distributed directly by ERMi through a network of sales representatives across the country.

35. Each ERMi Knee Extensionater® device is covered by the claims of the ‘660 Patent and each device is marked with the ‘660 Patent number. **Exhibit 4.**

Defendants’ Pre-Suit Knowledge of the ‘660 Patent

36. On July 26, 2010, Mr. Peach filed a provisional patent application having serial number 61/367,683 directed to a Knee Extension Therapy Device (hereinafter the “Peach ‘683 Application”).

37. One year later, on July 25, 2011, Mr. Peach filed a non-provisional patent application having serial number 13/190,028 (hereinafter the “Peach ‘028 Application”). The Peach ‘028 Application published to the public on January 26, 2012. **Exhibit 5.**

38. The United States Patent and Trademark Office commenced prosecution of the Peach ‘028 Application and rejected that application on August 2, 2013. As part of the office action which supplied the rejection of the Peach ‘028 Application, the patent office supplied a “Notice of References Cited” which listed 14 United States patents and patent publications. Among these patent references cited by the USPTO in its rejection of the Peach ‘028 Application

is Dr. Branch's '660 Patent. **Exhibit 6**. Mr. Peach's patent application became abandoned on September 11, 2014.

39. Accordingly, Mr. Peach had actual notice of the '660 Patent no later than August 2, 2013.

The Accused Device

40. Mr. Peach maintains a website located at <https://indianabrace.com/> **Exhibit 7**.

41. On his website, Mr. Peach offers for sale numerous products including the "Clyde's TKE Terminal Knee Extender." <https://indianabrace.com/knee-xtf-extensionframe.aspx>. **Exhibit 8**.

42. Mr. Peach's website is replete with images of the accused devices including the following:







43. On information and belief, the above image depicts Mr. Peach himself using the accused device.

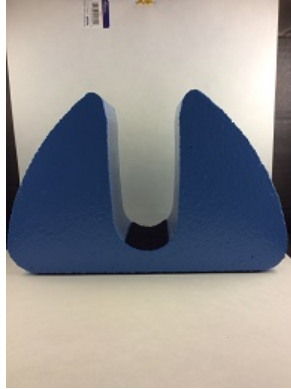
44. In addition to the images, Mr. Peach's website provides a hyperlink to the following video: <https://www.youtube.com/watch?v=dDgwhbf9hI>, in which Mr. Peach describes the Accused Device and its application.

45. On his website, <https://indianabrace.com/clydesterminalkneeextender.aspx>, Mr. Peach also sells replacement parts for the Accused Device, including the "Bolster," "Knee Control Pad," and "Pump and Bladder Assembly." **Exhibit 9.**

46. Images of the replacement parts offered by Mr. Peach include the following:



TKE Pump and Bladder Assembly



TKE BOLSTER



TKE Knee Control Pad

47. On his website, Mr. Peach falsely advertises that his “Terminal Knee Extender (TKE) for knee flexion contractures” is “Patent pending” notwithstanding that Mr. Peach’s patent application directed to the Accused Device has been abandoned since at least September 11, 2014. **Exhibit 7; Exhibit 10**.



6/27/19 Clyde's Amazing TKE
TO: Michael H./Sarasota, FL
"Knee Replacement Rehab" -
Call Clyde or Text Direct
317.445.1477

Price: \$399.00

[MORE INFORMATION](#)

Terminal Knee Extender (TKE) for knee flexion contractures. **Patent pending.**

Users of the Accused Device

48. On his website, Mr. Peach maintains a running list of “current” “users” of the Accused Device. **Exhibit 11**. This list includes names of individuals and companies who have purchased the Accused Device from Mr. Peach and who are “users” of the Accused Device.

49. Many of the current users of the Accused Device are hospitals, physicians, orthopedic clinics, and physical therapy clinics among others including at least the following: Lawrence Memorial Hospital in Lawrence, KS; UPMC Centers for Rehab Services in Pittsburgh, PA; Team Rehab Physical Therapy in Fishers, IN; Methodist Sports Medicine Physical Therapy in Indianapolis, IN and in Greenwood, IN; Fisiomedical in Naples, Italy; San Diego Orthopaedic Clinic in Chula Vista, CA; Advanced Rehab Tech in Yorba Linda, CA; 1 Source Fitness & Sprots – Neuro Rehab in Snellville, GA; University of Utah in Salt Lake City, UT; Hazel Hawkins Memorial Hospital in Hollister, CA; Constructify Ltd. in Denver, CO; Accelerated Sports Therapy & Fitness in Minneapolis, MN; Midwest Physical Therapy in Lincoln, NE; Princeton Physical Therapy & Sports Medicine in Princeton, MO; Accelerated Rehabilitation Center in Carmel, IN; New Options Sports in Dallas, TX; Easter Idaho Physical Therapy in Blackfoot, ID; Cache Valley Hospital in Logan, UT; Orthopaedic Associates in Evansville, IN; Lakeland Healthcare in St. Joseph, MI; Mountainland PT Clinton in Clinton, UT; Lakes Region General Hospital in Laconia, NH; Mountain West PT in Logan, UT; Mountain West PT in Nibley, UT; Newport Hospital in Newport, WA; Western Medical Equipment in Atlanta, GA; University of Utah Athletics in Salt Lake City, UT; Utah Orthopaedic Center in Salt Lake City, UT; Badger Sports Medicine in Indianapolis, IN; Innovative Physical Therapy in Kelseyville, CA; and 6th Medical Group MacDill AFB in Tampa, FL. In addition to these entities, Mr. Peach

indicates on his website that numerous other individuals are current users around the country and indeed the world. In total, Mr. Peach lists over 125 current users. **Exhibit 11.**

50. According to Mr. Peach’s website, the earliest of the “current” “users” began use on August 5, 2012 and the most recent of the “current” “users” began use on March 7, 2019.

Exhibit 11.

51. Additionally, the website notes a sale in Sarasota, Florida as recently as June 27, 2019. **Exhibit 8.**

Comparison of the Accused Device and ERMI’s Knee Extensionater® Device

52. ERMI’s Knee Extensionater ® Device and the Accused Device are remarkably similar in function, design, and appearance.

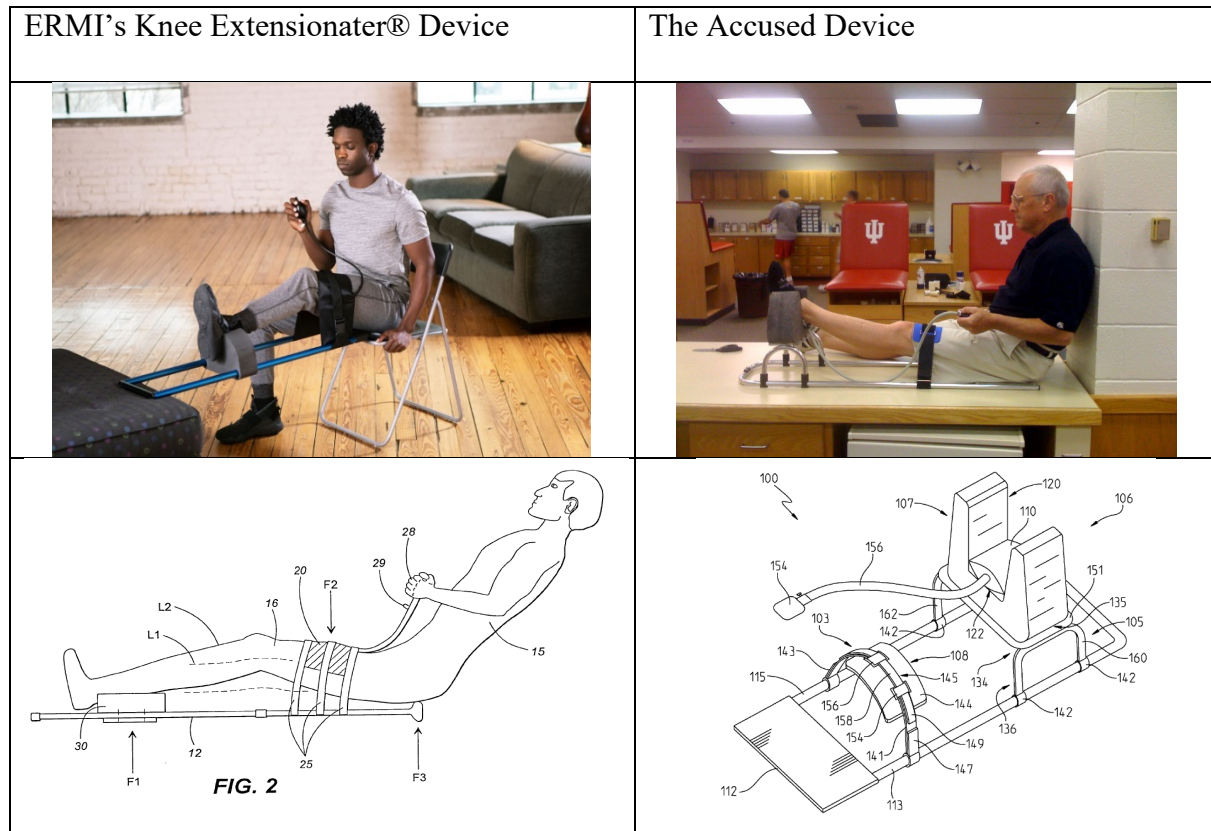


Fig. 2
U.S. Pat. No. 6,669,660

Fig. 4
Peach Apl. No. 13/190,028

COUNT I – WILLFUL DIRECT PATENT INFRINGEMENT

35 U.S.C. § 271(a)

53. ERMI hereby incorporates paragraphs 1-52 above as if fully set forth herein.

54. Mr. Peach has directly infringed at least Claim 1 the ‘660 Patent through using, selling, distributing, leasing, offering for lease, and/or offering to sell and distribute the Accused Device.

55. The Accused Device embodies at least Claim 1 the ‘660 Patent.

56. Mr. Peach has literally infringed at least Claim 1 of the ‘660 Patent.

57. Mr. Peach has infringed at least Claim 1 of the ‘660 Patent pursuant to the Doctrine of Equivalents.

58. On information and belief, Mr. Peach has used the Accused Device in demonstration of the Accused Device.

59. Mr. Peach had actual knowledge of the ‘660 patent at least as early as August 2, 2013 and has willfully infringed the ‘660 Patent since at least that date.

60. As a result of Mr. Peach’s unlawful activities, ERMI has suffered irreparable harm.

61. As a result of Mr. Peach’s unlawful activities, ERMI has lost profits.

62. Mr. Peach’s infringement of the ‘660 Patent has injured 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)

63. ERMI hereby incorporates paragraphs 1-62 above as if fully set forth herein.

64. On information and belief, Mr. Peach has marketed, advertised, demonstrated, sold, distributed, leased, offered to lease, and offered to sell and to distribute the Accused Device to third parties including doctors, medical practices, care facilities, and directly to end user patients.

65. Mr. Peach has induced infringement of at least Claim 1 of the '660 Patent under 35 U.S.C. § 271(b).

66. In addition to directly infringing the '660 Patent, Mr. Peach has indirectly infringed, either literally or under the Doctrine of Equivalents, at least Claim 1 of the '660 Patent by instructing, directing and/or requiring others, including doctors, medical practices, care facilities, and end user patients, to purchase and to use the Accused Device.

67. The doctors, medical practices, care facilities and end-user patients have directly infringed the '660 Patent by using the Accused Device to treat end-user patients' knees.

68. The doctors, care providers, and medical practices have also directly infringed the '660 patent by prescribing the Accused Devices to end-user patients, by providing instructions on use to end-user patients, and by controlling and directing end-user patients' use of the Accused Device. Mr. Peach has had direct knowledge and/or has been willfully blind to the fact that he is inducing others, including doctors, medical practices, care facilities, and end user patients, to infringe by practicing, either themselves or in conjunction with Mr. Peach, at least Claim 1 of the '660 Patent.

69. By advertising, distributing, leasing, and/or selling the Accused Devices to others, Mr. Peach has knowingly and intentionally aided, abetted, and induced others to directly infringe at least Claim 1 of the '660 Patent.

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

71. By providing the Accused Device, as well as replacement parts, to others, Mr. Peach has contributed to the infringement by others of at least Claim 1 of the '660 Patent.

COUNT III – PATENT FALSE MARKING

35 U.S.C. §292

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

73. At least on Mr. Peach's website, Mr. Peach advertises that the Accused Device is "patent pending."

74. However, the Peach '028 Application became abandoned on September 11, 2014, over five years ago.

75. Mr. Peach has updated his website numerous times since the Peach '028 Application became abandoned but has never removed the words "patent pending."

76. Consumers are more likely to purchase a product which has been patented or for which patent protection is being sought.

77. On information and belief, Mr. Peach has profited by using the words "patent pending" in association with the Accused Device.

78. On information and belief, Mr. Peach has advertised that the Accused Device is "patent pending" at least on his website, for the purpose of deceiving the public.

79. ERMI has suffered competitive injury in the form of lost sales and lost profits as a result of Mr. Peach's deceptive use of the words "patent pending" in association with the Accused Device.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff ERMI LLC, by and through the undersigned, hereby respectfully asks the Court to enter judgment against Mr. Peach, granting the following relief:

A. An entry of judgment holding that Mr. Peach has directly infringed the '660 Patent and has induced infringement of the '660 Patent;

B. 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;

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 35 U.S.C. 292 which include lost profits;

D. A determination that Mr. Peach's 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 a date six years prior to the filing of this action through August 10, 2019; 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 21st day of November, 2019.

Respectfully submitted,

s/ Michael E. Dockins

Michael E. Dockins (IN Bar ID No. 26031-82)

SHUMAKER, LOOP & KENDRICK, LLP

1000 Jackson Street

Toledo, Ohio 43604

Tel: (419) 321-1473

Fax: (419) 241-6894

Email: mdockins@shumaker.com

Attorneys for Plaintiff ERMI LLC