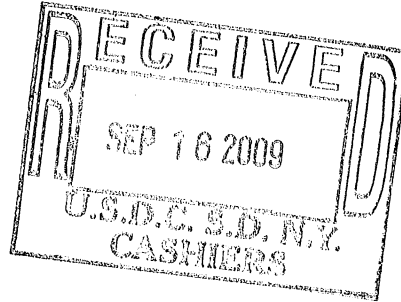


Judge Hellerstein

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ICON EAR, LLC and ICON EAR II, LLC, )  
)  
Plaintiffs, )  
)  
-against- )  
)  
DONNA MALONE and MARK ANSTETT )  
)  
Defendants. )  
)

110 Civ. 09-7963  
ECF CASE



COMPLAINT

ICON EAR, LLC (“ICON I”) and ICON EAR II, LLC (“ICON II”; collectively with  
ICON I, “ICON”), by their attorneys, for their complaint against Donna Malone (“Malone”) and  
Mark Anstett (“Anstett”; collectively with Malone, the “Guarantors”) allege:

**JURISDICTION AND VENUE**

1. This Court has diversity jurisdiction over the defendants pursuant to 28 U.S.C. §1332 (a)(2).
2. Venue is proper in the Southern District of New York under 28 U.S.C. §1391.
3. Pursuant to a guaranty dated December 24, 2007, as further described below, the Guarantors consented to jurisdiction in the state and federal courts within the County of New York, State of New York.

**THE PARTIES**

4. Plaintiffs are Delaware limited liability companies with their principal place of business located at 100 Fifth Avenue, 4<sup>th</sup> Floor, New York, NY 10011.
5. Upon information and belief, defendants are Illinois residents with an address c/o Equipment Acquisition Resources, Inc., 555 Vermont Street, Palatine, IL 60067.

## PRELIMINARY STATEMENT

6. On December 24, 2007, ICON I entered into a master lease agreement with Equipment Acquisition Resources, Inc. (“EAR”), an Illinois corporation, for the leasing of certain equipment (the “Master Lease Agreement”). The Master Lease Agreement contained equipment schedules that described certain equipment leased to EAR and the rental payments to be made by EAR. The Master Lease Agreement and the equipment schedules were guaranteed jointly and severally by the Guarantors, who are shareholders of EAR. ICON I subsequently assigned one of the equipment schedules to ICON II. EAR failed to make rental payments as required by the Master Lease Agreement and the equipment schedules and the Guarantors failed to subsequently perform EAR’s obligations and make payments as required by the Guaranty. Accordingly, ICON brings this action against the Guarantors for breach of the guaranty with respect to the Master Lease Agreement and the equipment schedules.

## FACTUAL ALLEGATIONS

### Master Lease Agreement and Guaranty

7. On December 24, 2007, ICON I and EAR entered into the Master Lease Agreement.

8. The Master Lease Agreement provides, among other things, that ICON I agrees to lease to EAR, and EAR agrees to lease from ICON I, certain equipment described in equipment schedules executed by EAR and ICON I.

9. Section 11 of the Master Lease Agreement sets forth the events that constitute a default under the Master Lease Agreement (an “Event of Default”). Specifically, Section 11(a)(i) provides that it shall be an Event of Default if the “Lessee [EAR] shall fail to make any payment of Advance Rent, Basic Rent, Renewal Rent, Additional Rent, Termination Value,

Purchase Option Price or any other amount payable by Lessee hereunder when due under any [equipment] Schedule and such failure shall continue for a period of five days”.

10. Section 11 of the Master Lease Agreement also sets forth ICON’s remedies in case of an Event of Default. Specifically, Section 11(b)(ii) provides that upon the occurrence of an Event of Default, ICON may:

By written notice to Lessee [EAR] specifying a Termination Value Determination Date [as defined in the Equipment Schedules] that shall not be earlier than 15 days after the date of such notice, may demand that Lessee pay to Lessor [ICON], and Lessee shall pay to Lessor, on the payment date specified in such notice, as liquidated damages for loss of a bargain and not as a penalty (in lieu of the Basic Rent due with respect to such items of Equipment after the Termination Value Determination Date specified in such notice), an amount equal to the Termination Value [as defined in the Equipment Schedules] for such items of Equipment computed as of such Termination Value Determination Date; and upon such payment of liquidated damages and the payment of all other Rent that shall be due and payable on or prior to such Termination Value Determination Date remaining unpaid, together with interest at the Overdue Rate [as defined in the Master Lease Agreement] for the period from the due date thereof to the date of payment, Lessor shall transfer, on an “as-is, where-is basis” without recourse or warranty (except as to the absence of Lessor’s Liens), such items of Equipment to Lessee (or such person as Lessee may direct), and Lessor shall execute and deliver such documents evidencing such transfer and take such further action as may be required to effect such transfer, all at Lessee’s sole cost and expense.

11. On December 24, 2007, April 24, 2008, June 6, 2008, and June 30, 2008, ICON I and EAR executed and delivered Equipment Schedules No. 1, 2, 3, and 4, respectively, with respect to the Master Lease Agreement (the “Equipment Schedules”), whereby ICON I leased certain equipment to EAR. On April 24, 2008, ICON I assigned Equipment Schedule No. 2 to ICON II.

12. The Equipment Schedules provide that EAR shall pay Base Rent (as defined in the Master Lease Agreement) for the equipment on a monthly basis at the rates of \$131,765.00, \$120,602.50, \$120,184.50, and \$46,911.00 per month, respectively. The base term for each Equipment Schedule began on July 1, 2008 and continues until June 30, 2013.

13. On December 24, 2007, in order to induce ICON I to lease the equipment to EAR, the Guarantors executed a Guaranty in favor of ICON I (the "Guaranty").

14. Pursuant to the Guaranty, the Guarantors agreed, jointly and severally, to unconditionally guarantee ICON I that the Guarantors will fully and promptly pay and perform all of EAR's present and future obligations with respect to the Master Lease Agreement and the Equipment Schedules. Specifically, Section 1.1 of the Guaranty provides that:

Each of the Guarantors, jointly and severally, hereby irrevocably and unconditionally guarantees to Lessor [ICON I] and its successors and assigns, the payment and performance of the Guaranteed Obligations (as defined below) as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise. Each of the Guarantors, jointly and severally, hereby, irrevocably and unconditionally covenants and agrees that it is liable for such Guaranteed Obligations as a primary obligor.

15. The Guarantors agreed to allow the Guaranty to be enforced by an assignee of an Equipment Schedule, such as ICON II. Specifically, Section 1.3 of the Guaranty provides, in part, that "This Guaranty may be enforced by Lessor [ICON I] and any subsequent holder of the Lease Documents [which includes the Equipment Schedules] and shall not be discharged by the assignment or negotiation of all or part of the Lease Documents."

16. The Guaranty also provides that ICON may enforce the Guaranty against the Guarantors before taking any other action. Specifically, Section 1.6 of the Guaranty provides that:

It shall not be necessary for Lessor [ICON I] (and each of the Guarantors hereby waive any rights which such Guarantor may have to require Lessor), in order to enforce the obligations of any of the Guarantors hereunder, first to (i) institute suit or exhaust its remedies against Lessee [EAR] or others liable under the Lease Documents [the Master Lease Agreement, the Equipment Schedules, and related documents] or the Guaranteed Obligations or any other person, (ii) enforce Lessor's rights against any collateral which shall ever have been given to secure the performance of Lessee thereunder, (iii) join Lessee or any others liable on the Guaranteed Obligations in any action seeking to enforce this Guaranty, (iv) exhaust any remedies available to Lessor against any collateral which shall ever have been given to secure the performance of Lessee, or (v) resort to any other means of obtaining payment of the Guaranteed Obligations. Lessor shall not be required to take any other action to reduce, collect or enforce the Guaranteed Obligations.

#### **Failure to Pay Rent by EAR**

17. Despite its plain obligations under the Master Lease Agreement, EAR has failed to, among other things, make payments for the months of August and September 2009 under the Equipment Schedules.

18. As of the date hereof, EAR owes \$838,926 as Basic Rent (as defined in the Equipment Schedules) for the months of August and September 2009 plus \$6,139.58 as interest on such Basic Rent.

19. After communicating with EAR in an effort to resolve this matter, ICON sent a Notice of Default dated August 7, 2009 to EAR.

20. On August 10, 2009, ICON sent a written demand to the Guarantors for payment under the Guaranty based on EAR's failure to make payments under the Master Lease Agreement and the Equipment Schedules.

21. Despite repeated assurances and promises to the contrary, EAR and the Guarantors failed to pay ICON the foregoing amounts.

22. After failing to receive payment from EAR or the Guarantors of the foregoing amounts, on September 11, 2009, ICON sent a second Notice of Default to EAR and demanded payment of \$21,599,653.30, which consists of (i) \$20,754,587.72 as liquidated damages measured after the Termination Value Determination Date of October 1, 2009, pursuant to Section 11(b)(ii) of the Master Lease Agreement; (ii) \$838,926.00 as Basic Rent (as defined in the Equipment Schedules) for the months of August and September 2009; and (iii) \$6,139.58 as interest on such Basic Rent.

23. On September 11, 2009, ICON sent an additional written demand to the Guarantors for payment under the Guaranty of \$21,599,653.30 based on EAR's failure to make payments under the Master Lease Agreement and the Equipment Schedules.

24. EAR and the Guarantors have failed to pay ICON the foregoing amounts.

#### **COUNT I – BREACH OF GUARANTY**

25. ICON realleges paragraphs 1 through 24 of the complaint as if fully set forth herein.

26. The Guarantors executed the Guaranty in favor of ICON.

27. The Guaranty is a valid and binding guaranty.

28. ICON has a claim against EAR due to EAR's failure to make payment under the Master Lease Agreement and the Equipment Schedules.

29. Despite due demand, the Guarantors have failed to make payment under the Guaranty.

30. By reason of the foregoing, the Guarantors have breached their guaranty obligations and caused damages to ICON, and the Guarantors are liable to ICON in the amount of \$21,599,653.30, plus such additional amounts that ICON proves at trial.

**PRAYER FOR RELIEF**

WHEREFORE, ICON respectfully requests judgment against the Guarantors as follows:

1. Awarding ICON damages in an amount to be proven at trial, but in an amount not less than \$21,599,653.30, plus interest;
2. Awarding ICON the costs and disbursements of this action, including its reasonable attorneys' fees; and
3. Awarding such other relief as the Court deems just and proper.

Dated: September 16, 2009

**MAZZEO SONG & BRADHAM LLP**

By: 

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**ICON EAR, LLC and ICON EAR II, LLC**