

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

Civil Action No.:

SKYDEX TECHNOLOGIES, INC., a Texas corporation,

Plaintiff,

v.

IMPLUS FOOTCARE, LLC, a Delaware limited liability company,

Defendant.

COMPLAINT

Plaintiff Skydex Technologies, Inc., by and through its undersigned counsel, HENSLEY KIM & HOLZER, LLC, hereby files its Complaint against Defendant Implus Footcare, LLC, and in support thereof states and alleges as follows:

PARTIES

1. Plaintiff Skydex Technologies, Inc. (“Skydex”) is a Texas corporation having its principal place of business located at 12508 E. Briarwood Ave., Suite 1-F, Centennial, CO 80112.

2. Defendant Implus Footcare, LLC (“Implus”) is a Delaware limited liability company with its principal place of office located at 2001 T.W. Alexander Drive, Box 13925, Durham, NC 27709-3925.

JURISDICTION AND VENUE

3. This is an action for, *inter alia*, patent infringement arising under the patent laws of the United States, Title 35 of the United States Code, and trademark infringement under the

trademark laws of the United States, Title 15 of the United States Code.

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1332(a)(1), 1338(a) and (b), 15 U.S.C. § 1121(a), 28 U.S.C. § 2201(a), and 28 U.S.C. § 1367(a). The amount in controversy, upon information and belief, exceeds \$75,000.00.

5. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (c), as a substantial part of the events or omissions giving rise to the claims herein occurred and/or a substantial part of the property that is the subject of the action, is situated in this judicial district.

6. This Court has personal jurisdiction over Implus insomuch as Implus has significant contacts with this state and district, has committed acts in this state and district that are subject to the allegations set forth here, and continuously markets, offers to sell, sells and/or distributes products in this state and district.

FACTUAL ALLEGATIONS

7. Skydex is a premier developer and manufacturer of footwear cushioning technology (the “Skydex Technology”). The Skydex Technology encompasses cushioning materials that are created by molding engineered plastics (*e.g.*, thermoplastic polyurethane raw materials) into chemically bonded, precisely shaped, open column structures, thereby creating thin, lightweight, strong and custom products that replace less effective cushioning and protective products. This feature has been a performance enhancing component for many popular running shoes.

8. On November 12, 1996, U.S. Patent No. 5,957,804, titled “Shoe Sole Component and Shoe Sole Component Construction Method,” was duly and legally issued to

inventors Joseph J. Skaja and Martyn R. Shorten (the “’804 Patent”). A true and correct copy of the ’804 Patent is attached to this Complaint as **Exhibit A**.

9. The ’804 Patent protects the Skydex Technology. By way of assignment, Skydex owns all right, title and interest in the ’804 Patent, including, but not limited to, the right to enforce the ’804 Patent and collect damages for past and future infringement.

10. On February 29, 2000, U.S. Patent No. 6,029,962, titled “Shock Absorbing Component and Construction Method,” was duly and legally issued to inventors Martyn R. Shorten and Joseph J. Skaja (the “’962 Patent”). A true and correct copy of the ’962 Patent is attached to the Complaint as **Exhibit B**.

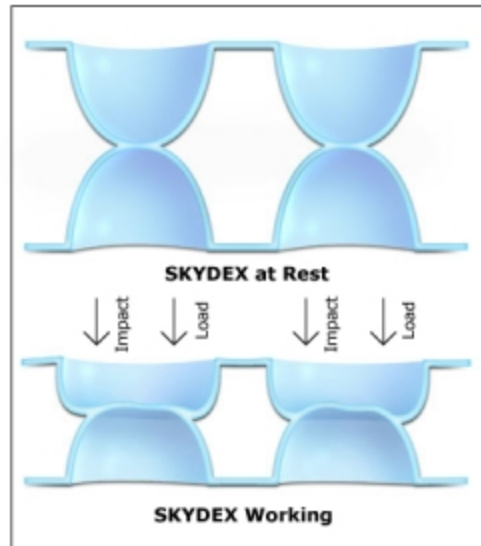
11. The ’962 Patent protects the Skydex Technology. By way of assignment, Skydex owns all right, title and interest in the ’962 Patent, including, but not limited to, the right to enforce the ’962 Patent and collect damages for past and future infringement.

12. On August 8, 2000, U.S. Patent No. 6,098,313, titled “Shoe Sole Component and Shoe Sole Component Construction Method,” was duly and legally issued to inventor Joseph J. Skaja (the “’313 Patent”). A true and correct copy of the ’313 Patent is attached to this Complaint as **Exhibit C**.

13. The ’313 Patent protects the Skydex Technology. By way of assignment, Skydex owns all right, title and interest in the ’313 Patent, including, but not limited to, the right to enforce the ’313 Patent and collect damages for past and future infringement.

14. An embodiment of the patented Skydex Technology includes products generated from molding high polymer resins into chemically bonded twin hemisphere structures, creating a

thin, lightweight, and durable shock absorption system for athletic shoe applications. See the cross-sectional illustration below.



15. The Skydex Technology has proven to be a very successful product in the market. For example, Nike has utilized the Skydex Technology in their famous Nike Air tennis shoes for years. Burton features Skydex Technology in their Ion boot. Skydex supported Pearl Izumi's successful launch into the performance running shoe market by providing it with an integrated fore and heel foot cushioning system using the Skydex Technology.

16. Skydex developed a distinctive look for the Skydex Technology by utilizing a colorant to color the protective open column structure blue. The use of blue to color the Skydex Technology (the "Skydex Blue Mark") distinguishes the Skydex Technology feature from competitive products, therefore allowing the consuming public to immediately identify the Skydex Technology. Hence, the Skydex Blue Mark has been used to distinguish the genuine Skydex materials from conventional cellular padding in at least the footwear and sports equipment markets at least as early as 2004.

17. In about 2003, Implus and Skydex entered into a Nondisclosure Agreement wherein Skydex revealed and disclosed to Sof Sole its Skydex Technology in furtherance of discussions of a potential business arrangement. Pursuant to this business arrangement, Skydex supplied Implus with a heel cup utilizing the Skydex Technology, and otherwise allowed Implus to market and sell products utilizing the Skydex Technology under the Sof Sole name. Under this agreement, Skydex retained all rights in the Skydex Technology.

18. In about 2005, the parties terminated their business relationship and went their separate ways. Subsequent to 2005, Implus had no rights to use any of Skydex' intellectual property.

19. Subsequent to 2005, Implus launched various performance insole products under the Sof Sole brand name, including the product referred to as Airr, Airr Arch, and Airr Orthotic (together referred to as the "Sof Sole Airr Products"). Implus states on its product packaging that the product utilizes a "maximum air cushioning for high-impact activities," and incorporates a "heel & arc encapsulated air chamber." See Example infringing product below.



20. The Sof Sole Airr Products utilize the Skydex Technology as well as the Skydex Blue trade dress. See Description of the Sof Sole Air Product utilizing the Skydex Technology and Skydex Blue depicted on Implus' website www.sofsole.com. Upon information and belief, Implus sells its Sof Sole Airr Products to a broad international market, distributing its products to mass retailers such as Sports Authority, Dick's Sporting Goods, Famous Footwear, The Athlete's Foot, and other large-scale retailers.



FIRST CLAIM FOR RELIEF
(Infringement of the '804 Patent)

21. Plaintiff hereby incorporates by reference each and every allegation set forth in the preceding paragraphs of this Complaint.

22. Implus has manufactured, used, offered for sale, sold, and/or imported, and continues to manufacture, use, offer for sell, sell, and/or import footwear products, including, but not limited to, its Sof Sole Airr Products that infringe the '804 Patent in violation of 35 U.S.C. § 271(a).

23. The Skydex Technology is a material part of the heel & arch encapsulated air chamber feature of the Sof Sole Airr Products which lack substantial uses other than those which infringe the '804 Patent.

24. Implus has induced or contributed to the direct infringement by others of the '804 Patent by actively instructing, assisting, or encouraging others to make, use, sell, offer to sell, and/or import products, including, but not limited to the Sof Sole Air Insole products. These actions include knowingly inducing and encouraging retailers to use, sell, offer for sale, or import infringing products.

25. As a result of Implus's direct and indirect infringement of Skydex rights in the '804 Patent, Skydex has suffered and will continue to suffer damages in an amount to be proven at trial.

26. In addition to actual damages, Skydex is entitled to the recovery of Implus's profits pursuant to 35 U.S.C. § 289.

27. Implus's infringement of the '804 Patent has been with full knowledge of the '804 Patent and Skydex rights therein.

28. Implus's continued infringement with full knowledge of the '804 Patent and Skydex rights therein is willful.

29. Implus's willful infringement of Skydex rights in the '804 Patent warrants an award of treble damages under 35 U.S.C. § 284 and makes this an exceptional case warranting an award of Skydex reasonable attorneys' fees and costs under 35 U.S.C. § 285.

30. Implus's infringement of the '804 Patent has caused irreparable harm to Skydex, and will continue to do so unless enjoined. As a result, Skydex is entitled to injunctive relief pursuant to 35 U.S.C. § 283.

SECOND CLAIM FOR RELIEF
(Infringement of the '962 Patent)

31. Plaintiff hereby incorporates by reference each and every allegation set forth in the preceding paragraphs of this Complaint.

32. Implus has manufactured, used, offered for sale, sold, and/or imported, and continues to manufacture, use, offer for sell, sell, and/or import footwear products, including, but not limited to, its Sof Sole Airr Products that infringe the '962 Patent in violation of 35 U.S.C. § 271(a).

33. The Skydex Technology is a material part of the heel & arch encapsulated air chamber feature of the Sof Sole Airr Products, which lack substantial uses other than those which infringe the '962 Patent.

34. Implus has induced or contributed to the direct infringement by others of the '962 Patent by actively instructing, assisting, or encouraging others to make, use, sell, offer to sell, and/or import products, including, but not limited to the Sof Sole Air Insole products. These

actions include knowingly inducing and encouraging retailers to use, sell, offer for sale, or import infringing products.

35. As a result of Implus's direct and indirect infringement of Skydex rights in the '962 Patent, Skydex has suffered and will continue to suffer damages in an amount to be proven at trial.

36. In addition to actual damages, Skydex is entitled to the recovery of Implus's profits pursuant to 35 U.S.C. § 289.

37. Implus's infringement of the '962 Patent has been with full knowledge of the '962 Patent and Skydex rights therein.

38. Implus's continued infringement with full knowledge of the '962 Patent and Skydex rights therein is willful.

39. Implus's willful infringement of Skydex rights in the '962 Patent warrants an award of treble damages under 35 U.S.C. § 284 and makes this an exceptional case warranting an award of Skydex reasonable attorneys' fees and costs under 35 U.S.C. § 285.

40. Implus's infringement of the '962 Patent has caused irreparable harm to Skydex, and will continue to do so unless enjoined. As a result, Skydex is entitled to injunctive relief pursuant to 35 U.S.C. § 283.

THIRD CLAIM FOR RELIEF
(Infringement of the '313 Patent)

41. Plaintiff hereby incorporates by reference each and every allegation set forth in the preceding paragraphs of this Complaint.

42. Implus has manufactured, used, offered for sale, sold, and/or imported, and continues to manufacture, use, offer for sell, sell, and/or import footwear products, including, but

not limited to, its Sof Sole Airr Products that infringe the '313 Patent in violation of 35 U.S.C. § 271(a).

43. The Skydex Technology is a material part of the heel & arch encapsulated air chamber feature of the Sof Sole Airr Products, which lack substantial uses other than those which infringe the '313 Patent.

44. Implus has induced or contributed to the direct infringement by others of the '313 Patent by actively instructing, assisting, or encouraging others to make, use, sell, offer to sell, or import products, including, but not limited to the Sof Sole Air Insole products. These actions include knowingly inducing and encouraging retailers to use, sell, offer for sale, or import infringing products.

45. As a result of Implus's direct and indirect infringement of Skydex rights in the '313 Patent, Skydex has suffered and will continue to suffer damages in an amount to be proven at trial.

46. In addition to actual damages, Skydex is entitled to the recovery of Implus's profits pursuant to 35 U.S.C. § 289.

47. Implus's infringement of the '313 Patent has been with full knowledge of the '313 Patent and Skydex rights therein.

48. Implus's continued infringement with full knowledge of the '313 Patent and Skydex rights therein is willful.

49. Implus's willful infringement of Skydex rights in the '313 Patent warrants an award of treble damages under 35 U.S.C. § 284 and makes this an exceptional case warranting an award of Skydex reasonable attorneys' fees and costs under 35 U.S.C. § 285.

50. Implus's infringement of the '313 Patent has caused irreparable harm to Skydex, and will continue to do so unless enjoined. As a result, Skydex is entitled to injunctive relief pursuant to 35 U.S.C. § 283.

**FOURTH CLAIM FOR RELIEF
(Trade Dress Infringement, 15 U.S.C. § 1125(a))**

51. Plaintiff hereby incorporates by reference each and every allegation set forth in the preceding paragraphs of this Complaint.

52. Through its commercial efforts, Skydex has been successful in establishing recognizable trade dress in its Skydex Blue Mark.

53. The Skydex Blue Mark is comprised of the unique blue coloring in combination with the Skydex Technology within the heel and arch encapsulated air chamber of certain products made, manufactured, sold, offered for sale, marketed, and/or distributed by Implus, including certain of its Sof Sole Airr Products.

54. The Skydex Blue Mark is non-functional and has become known and recognized by consumers and members of the public as indicating that Skydex is the source of its shoe sole product and/or that Skydex is in some manner associated with that product, and therefore has acquired a secondary meaning.

55. The Skydex Blue Mark, used in combination with the heel and arch encapsulated air chamber, and other footwear incorporating the Skydex Technology, is an inherently distinctive feature of such shoe products.

56. Implus' Sof Sole Airr Products incorporate the Skydex Blue Mark.

57. Implus's unauthorized use of the Skydex Blue Mark in its products, including its Sof Sole Airr Products, is likely to confuse and deceive members of the public and trade as to the source or origin of the products, and is likely to confuse and deceive members of the public and the trade that its products are sponsored by or affiliated with Skydex.

58. The foregoing actions of Implus constitute trade dress infringement in violation of Section 43 of the Lanham Act, 15 U.S.C. § 1125(a).

59. The foregoing actions of Implus have been intentional, deliberate, willful and in utter disregard of Skydex rights.

PRAYER FOR RELIEF

WHEREFORE, Skydex prays for entry of judgment granting:

A. A finding that Implus has directly infringed the '804 Patent, the '962 Patent, and the '313 Patent;

B. A finding that Implus has induced or contributed to the direct infringement of the '804 Patent, the '962 Patent, and the '313 Patent;

C. A preliminary and/or permanent injunction restraining Implus from its officers, agents, servants, employees, directors, representatives, successors-in-interest, parent corporations, subsidiary corporations, affiliated company, and all other persons, firms, or entities acting in concert or participating with the, directly or indirectly, who receive actual notice of this judgment, from manufacturing, using, marketing, distributing, selling, offering to sell, and importing any footwear product that infringes the '804 Patent, the '962 Patent, or the '313 Patent and/or the Skydex Blue Mark;

D. An award to Skydex of its actual damages based on its claim in an amount according to proof;

E. An award to Skydex of the total profits received or derived by Implus from its manufacture, marketing, sale, offering for sale, and/or distribution of products bearing or using any copy of colorable imitation of the '804 Patent, '962 Patent, or '313 Patent pursuant to 35 U.S.C. § 289 or the Skydex Blue Mark;

F. A declaration that Implus's infringement and other wrongful acts herein alleged be determined deliberate, willful, and in conscious disregard of Skydex rights pursuant to 35 U.S.C. § 284;

G. A declaration that this case is exceptional, and, in conjunction therewith, award reasonable attorneys' fees and costs pursuant to 35 U.S.C. § 285;

H. An award of treble damages against Implus pursuant to 35 U.S.C. § 284 as a result of Implus's deliberate and willful infringement in conscious disregard of Skydex rights;

I. Enter a judgment holding that Implus has willfully infringed upon Skydex trade dress;

J. Award Skydex actual damages as allowed under 15 U.S.C. § 1117;

K. Award Skydex any other and further relief this Court deems appropriate.

JURY DEMAND

Skydex hereby demands a trial by jury on all issues so triable.

Respectfully submitted this 24th day of June, 2011.

s/ Michael P. Dulin

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