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10
11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 IMPLUS FOOTCARE, LLC,
14 Plaintiff,
15 v.
16 DAYLINE INNOVATIONS INC.,
17 Defendants.

Case No. '22CV0688 RBM AHG

**COMPLAINT FOR DECLARATORY
JUDGMENT**

JURY TRIAL REQUESTED

1 **COMPLAINT FOR DECLARATORY JUDGMENT**

2 This is a Complaint by Implus Footcare, LLC (“Implus”), an industry-leading
3 consumer packaged goods company specializing in fitness, outdoor, sporting goods
4 and footcare products, to protect its customer(s) from a patent infringement lawsuit(s)
5 filed by Dayline Innovations Inc. (“Dayline”) and alleges as follows:

6 **NATURE OF THE ACTION**

7 1. This is a civil action seeking a declaratory judgment of non-infringement
8 of United States Patent No. 9,855,453 (“the ’453 patent”) and all other eligible relief
9 pursuant to 28 U.S.C. §§ 2201 and 2202.

10 2. On March 8, 2022, Dayline caused to be filed in the U.S. District Court
11 for the Eastern District of Texas a complaint for patent infringement of the ’453 patent
12 against Dick’s Sporting Goods, Inc. (“DSG”), Civil Action No. 2:22-cv-00074-RWS-
13 RSP (complaint attached hereto as Exhibit 1), based at least in part on DSG’s sales of
14 the accused SKLZ Reactive Agility Ladder product.

15 3. Implus supplies to DSG, and DSG is Implus’ customer, for the SKLZ
16 Reactive Agility Ladder product.

17 4. DSG has demanded of Implus that Implus indemnify DSG against
18 Dayline’s claims, and DSG has agreed to indemnify and hold harmless DSG as to any
19 liability or harm arising from the claims lodged by Dayline in Civil Action No. 2:22-
20 cv-00074-RWS-RSP (E.D. Tex.).

21 5. Dayline’s lawsuit against Implus’ customer(s) has raised the specter of
22 litigation against Implus itself for at least contributory, induced, and/or direct
23 infringement, as the exclusive supplier of the accused product, and of subjecting
24 Implus to judgment(s) based on indemnity claims by its customer(s).

25 6. Case law recognizes the right of a supplier in Implus’ situation to file for
26 a declaratory judgment to resolve, once and for all, whether its products infringe the
27 asserted patent. Under the “customer suit” exception, such litigation by a supplier
28 takes precedence over litigation against its customers, and to that end, district courts

1 are additionally permitted to enjoin customer suits pending resolution of a supplier
2 suit such as this. *E.g., Katz v. Lear Siegler*, 909 F.2d 1459, 1464 (Fed. Cir. 1990).

3 **PARTIES**

4 7. Plaintiff Implus is a company organized and existing under the laws of
5 the State of Delaware, with offices and employees through several of the United
6 States, including the State of California and the State of North Carolina. Implus'
7 principal business office is located at 2001 T.W. Alexander Drive, Durham, NC
8 27709.

9 8. Implus owns as a division a brand known as SKLZ, which is a provider
10 of multisport athletic performance and skill development training products.

11 9. The SKLZ division has a place of business at 2231 Rutherford Road, Ste.
12 110, Carlsbad, CA 92008.

13 10. On information and belief, Defendant Dayline is a Canadian corporation
14 with a principal place of business located at 594 Copper Drive, Britannia Beach, BC
15 V0N 1J0, Canada.

16 **JURISDICTION AND VENUE**

17 11. This action arises under the Patent Laws of the United States, Title 35 of
18 the United States Code, Sections 101 *et seq.*, and the Federal Declaratory Judgment
19 Act, 28 U.S.C. §§ 2201 and 2202. An actual, substantial, and continuing justiciable
20 controversy exists between Implus and Dayline. This Court has subject matter
21 jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338.

22 12. Dayline's complaint against DSG alleges that DSG's sales of the SKLZ
23 Reactive Agility Ladder product constitutes infringement of the '453 patent.

24 13. Dayline's complaint against DSG identifies Pro Performance Sports,
25 LLC, as the manufacturer of the SKLZ Reactive Agility Ladder product supplied to
26 DSG. Ex. 1 at ¶ 15.

27 14. On or around July 31, 2018, Implus purchased substantially all of the
28 assets of Pro Performance Sports, LLC, including the SKLZ brand.

1 15. Implus, therefore, is DSG’s exclusive supplier for the SKLZ Reactive
2 Agility Ladder product.

3 16. DSG has demanded indemnification from Implus related to Dayline’s
4 lawsuit and Implus has agreed to defend DSG against Dayline’s claims.

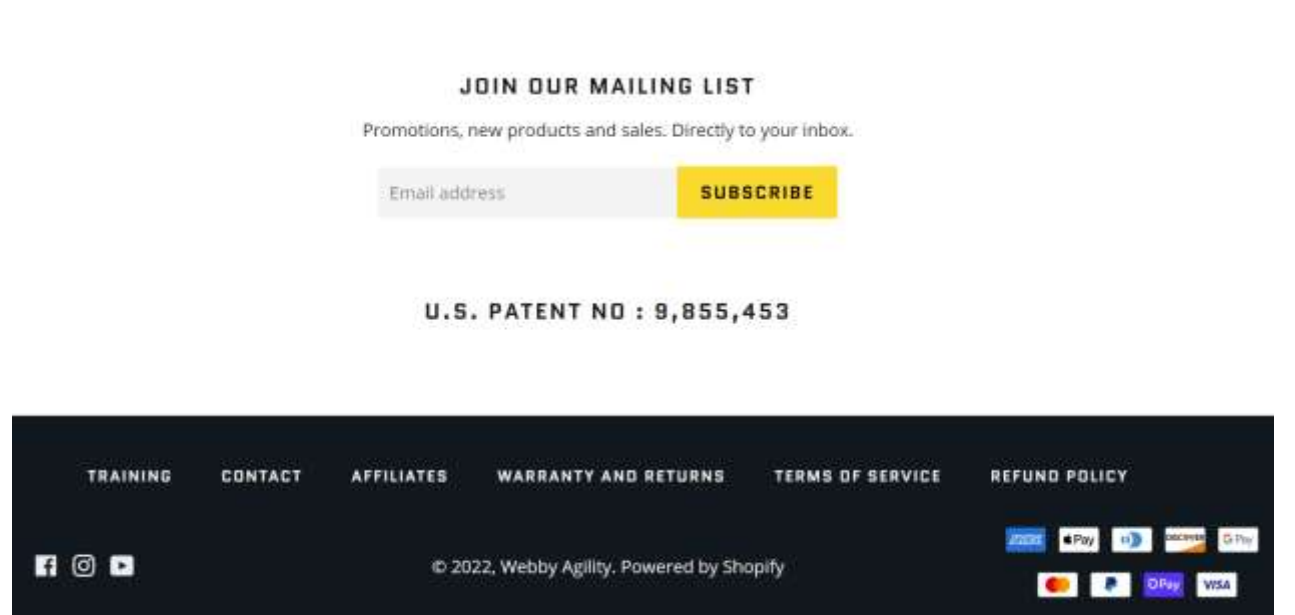
5 17. The SKLZ division of Implus maintains an office staffed with employees
6 that is located at 2231 Rutherford Road, Ste. 110, Carlsbad, CA 92008.

7 18. The SKLZ division of Implus and its employees design and develop
8 sports and fitness related products, including the SKLZ Reactive Agility Ladder
9 product that is accused of infringement in the lawsuit by Dayline against DSG.

10 19. Dayline markets its own product within the agility ladder market, called
11 the Webby Agility Trainer, as identified in the complaint. Ex. 1 at pg. 1.

12 20. Dayline alleges in its complaint that it has complied with the marking
13 requirements of 35 U.S.C. § 287 by marking its products. Id. at ¶ 45.

14 21. Dayline maintains a website at <https://webbyagility.com>, where Dayline
15 markets the Webby product to U.S. customers, including customers in this district.
16 The website contains information regarding the ’453 patent, as indicated below.



22. Dayline also markets and sells the Webby Agility Trainer via Amazon.com, located at the following URL: <https://www.amazon.com/Webby-Agility-Trainer/dp/B07CZL3T6N>. On information and belief, Dayline has used the Amazon.com website to market and sell the Webby Agility Trainer product via channels of commerce established by Dayline throughout the United States and California to customers in this district.

Webby Agility Trainer – Circle Speed and Agility Ladder for High Intensity Footwork Drills and Skills – A Circular Piece of Training Equipment That Changes The Way You Move

Brand: Webby
★★★★★ 212 ratings

\$49.99

Best Seller

prime & FREE Returns

Best price

Save up to 14% with business pricing. Sign up for free Amazon Business account.

- THE WORLDS FIRST AND ONLY CIRCULAR AGILITY LADDER - Sport is angular not linear. The Webby allows athletes to take their game to the next level by reprogramming the body to move more effectively, efficiently and powerfully at all angles.
- SELF ERECTS AND HOLDS ITS SHAPE - Our patented design allows athletes to set the Webby up in seconds and it never bunches or changes shape reducing down time during drills.
- NO MESS AND EASY TO STORE - Never untangle your agility ladder again, the Webby folds up neatly from a 6' circle down to an 18" circle and comes with a convenient storage bag to pack away neatly between sessions.

FREE delivery Sunday, May 8. Order within 1 hr 33 mins.

Deliver to Adels - Arlington 22213

In Stock

Qty: 1

Add to Cart

Buy Now

Secure transaction

Ships from Amazon

Sold by Dayline Innovations Inc

Return policy: Eligible for Return, Refund or Replacement within 30 days of receipt

Add a gift receipt for easy returns

Add to List

Add to Baby Registry

Add to Registry & Gifting

Have one to sell?

Sell on Amazon

23. On information and belief, Dayline has caused to be listed upon the Amazon.com website the '453 patent number in association with the Webby Agility Trainer product.

Important information

Legal Disclaimer

Always check with a physician before starting any physical activity. US Patent No. 9,855,453

24. This Court has personal jurisdiction over Dayline because Dayline—through at least its president, Mr. Jason Day—has purposefully availed itself of the privileges of conducting activity in this district by seeking to and conducting business,

1 legal, and/or other commercial activity associated with at least the advertising,
2 marketing, sale, offer for sale, licensing, and/or use of the Webby Agility Trainer
3 product and/or products associated with the '453 patent with persons and/or entities
4 in this district, giving rise to the controversy between Implus and Dayline at issue in
5 this action. Mr. Jason Day is also the named inventor of the '453 patent.

6 25. At least as early as April 2017, Mr. Jason Day engaged in
7 communications with representatives at SKLZ in Carlsbad, California in an attempt
8 to license the purported invention claimed by the '453 patent.

9 26. Between April 2017 and February 2021, Mr. Day sent at least 14
10 communications to SKLZ representatives located in Carlsbad, CA seeking to license
11 the purported invention claimed by the '453 patent. For example, after the '453 patent
12 was granted on January 2, 2018, Mr. Day sent at least five communications to a SKLZ
13 representative in Carlsbad, CA to license the '453 patent.

14 27. In 2017, Mr. Day sent a prototype of his alleged invention to SKLZ in
15 Carlsbad, CA. On information and belief, he provided this prototype in an effort to
16 license the '453 patent, which was at that time pending before the U.S. Patent Office.

17 28. In addition, on April 6, 2021, Dayline, through its counsel at Snell &
18 Wilmer, located in San Diego, CA, sent correspondence to Implus regarding threats
19 of infringement and Dayline's intent to take all necessary steps to enforce its patent
20 rights surrounding Implus' SKLZ Reactive Agility Ladder product. Over a period of
21 nearly two months, Dayline, through its counsel at Snell & Wilmer, engaged in
22 continuous communications with Implus—including attempts to interact with SKLZ
23 representatives located in Carlsbad, CA—to discuss a business arrangement regarding
24 Dayline's Webby Agility Trainer product and/or products associated with the '453
25 patent.

26 29. On information and belief, Dayline's April-May 2021 communications
27 sought a licensing arrangement for the '453 patent and/or products associated with it.
28

1 30. On information and belief, the foregoing pattern of communications and
2 licensing attempts culminated in the March 8, 2022 patent infringement complaint in
3 the Eastern District of Texas (Ex. 1) filed by Dayline against Implus' customer, DSG.

4 31. The SKLZ division designed and developed the Reactive Agility Ladder
5 product in Carlsbad, CA. Implus, in conjunction with its SKLZ division located in
6 Carlsbad, California, continues to market, sell, and offer for sale the accused SKLZ
7 Reactive Agility Ladder product. For at least the foregoing reasons, Dayline's
8 allegations give rise to implied direct and/or indirect infringement claims against
9 Implus and its lawsuit against DSG has exposed Implus to potential indemnity and
10 infringement liability.

11 32. Dayline's allegations and lawsuit threaten actual and imminent injury to
12 Implus that can only be redressed by judicial relief and, thus, there is a substantial
13 controversy between Implus and Dayline that is of sufficient immediacy and reality
14 for the Court to issue a declaratory judgment. Absent such a declaration of
15 noninfringement, Dayline's continued wrongful assertions of infringement will cause
16 Implus harm.

17 33. Venue is proper in this Court under 28 U.S.C. § 1391, because a
18 substantial part of the events or omission giving rise to Dayline's claim occurred in
19 this district. Venue is also proper in this judicial district for Dayline pursuant to 28
20 U.S.C. § 1391 because it is subject to the Court's personal jurisdiction and is not a
21 resident in the United States and therefore may be sued in any judicial district.

22 **FACTUAL BACKGROUND**

23 34. Implus is an industry-leading consumer packaged goods company
24 specializing in fitness, outdoor, sporting goods and footcare products. Implus owns
25 and operates the SKLZ brand, which developed the SKLZ Reactive Agility Ladder
26 product. Implus distributes its products, including SKLZ products, to retailers such
27 as DSG, which operate direct-to-consumer physical and online retail locations
28 throughout the United States.

1 35. On March 8, 2022, Dayline sued Implus customer DSG in the U.S.
2 District Court for the Eastern District of Texas for infringement of the '453 patent
3 based at least in part on DSG's sales of Implus' accused SKLZ Reactive Agility
4 Ladder product. A copy of the '453 patent is attached as Exhibit 2.

5 36. Dayline purports to be the owner, by assignment, of the '453 patent. Ex.
6 1 at ¶ 36.

7 37. Dayline alleges that DSG infringes the '453 patent:

8 Dick's directly infringes one or more claims of the '453
9 Patent, including at least claims 1, 2, 3, 4, 5, 7, 9, 10, 11, 13,
10 and 14 under 35 U.S.C. § 271(a) by making, using, offering
11 for sale, importing, distributing, and/or selling the accused
product, and aiding and abetting its normal use.

12 ***

13 For example, Dick's is liable under 35 U.S.C §271(b) for
14 knowingly inducing others (namely end users and customers)
15 to infringe by encouraging, aiding, and abetting the use and
16 setup of the accused agility ladders.

17 Ex. 1 at ¶¶ 40, 42.

18 38. Neither DSG nor Implus have infringed the '453 patent as a result of any
19 activity associated with Implus' SKLZ Reactive Agility Ladder product.

20 39. Claim 1 of the '453 patent requires:

21 An exercise device comprising:

22 an outer ring having a diameter of at least 4 ft;

23 an inner ring located within the outer ring, the inner ring
24 having a diameter of at least 2 ft;

25 and more than 6 spokes connecting the inner ring and the
26 outer ring;
27

28

1 wherein at least one of the inner ring and the more than 6
2 spokes are elastic and configured to urge the more than 6
3 spokes into a radial configuration, wherein the device is
4 configured such that a human user can step from any position
5 within a region defined by an inner surface of the inner ring
6 to any region of a plurality of regions defined by the outer
7 ring, the more than 6 spokes and the inner ring, and wherein
8 the outer ring is resiliently deformable.

9 Ex. 2 at Claim 1.

10 40. For instance, and without limitation, neither the inner ring nor any of the
11 spokes of the SKLZ Reactive Agility Ladder are “elastic.” Thus, the SKLZ Reactive
12 Agility Ladder does not meet, literally or as an equivalent thereof, at least the
13 requirement that at least one of the inner ring and the more than 6 spokes are elastic
14 and configured to urge the more than 6 spokes into a radial configuration.

15 41. Implus has a direct and substantial interest in defeating any patent
16 infringement claims relating to the SKLZ Reactive Agility Ladder product. Dayline’s
17 allegations directly implicate Implus and give rise to implied direct and/or indirect
18 infringement claims against Implus, and Dayline’s lawsuit against DSG has exposed
19 Implus to potential indemnity and infringement liability.

20 42. Prior to Dayline’s suit against DSG, Dayline—working through its
21 counsel at Snell & Wilmer, located in San Diego, California—sent a letter on April
22 6, 2021 to Implus identifying the ’453 patent and indicating that Implus should be
23 significantly concerned that the SKLZ Reactive Agility Ladder product infringes the
24 ’453 patent.

25 43. The controversy is between parties having adverse legal interests and is
26 of sufficient immediacy and reality to warrant issuance of a declaratory judgment
27 under 28 U.S.C. § 2201 as to the alleged infringement of the ’453 patent.

28 44. Because Implus is the exclusive supplier of the accused SKLZ Reactive
Agility Ladder product, resolution of this action will resolve the lawsuit against
Implus’ customer, DSG.

1 45. Implus has brought this action to seek a timely resolution of Dayline’s
2 allegations, and to remove itself and its customer from the cloud over their
3 respective businesses created by Dayline’s current lawsuit and the threat of future
4 lawsuits.

5 **COUNT I – DECLARATION OF NON-INFRINGEMENT OF U.S. PAT. NO.**
6 **9,855,453**

7 46. Implus restates and incorporates by reference the foregoing paragraphs as
8 though set forth fully herein.

9 47. Dayline has alleged, and continues to allege, that use or incorporation of
10 Implus’ SKLZ Reactive Agility Ladder infringes claims of the ’453 patent.

11 48. Neither Implus nor its customer(s) infringes the ’453 patent, either
12 directly or indirectly, and either literally or under the doctrine of equivalents, through
13 their use, sale, offer for sale, import or manufacture of any Implus product, including
14 the SKLZ Reactive Agility Ladder. For example, neither the inner ring nor any of the
15 spokes of the SKLZ Reactive Agility Ladder are “elastic.” Thus, the product does
16 not meet, literally or as an equivalent thereof, at least the requirement that at least one
17 of the inner ring and the more than 6 spokes are elastic and configured to urge the
18 more than 6 spokes into a radial configuration.

19 49. An actual and justiciable controversy exists between Implus and Dayline
20 as to Implus’ non-infringement of the ’453 patent.

21 50. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 *et*
22 *seq.*, Implus seeks a declaration that it does not infringe any claim of the ’453 patent.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Implus prays for a declaratory judgment against Dayline as
25 follows:

26 A. A declaration that Implus does not infringe any claim of the ’453 patent;

27 B. An injunction against Dayline and each of its officers, employees, agents,
28 attorneys, and any persons acting on its behalf or in concert with it, restraining and

1 enjoining them from further prosecuting or instituting any action alleging that Implus,
2 through any action with any of its methods, products, or technology, or others' actions
3 with the same, infringes any claim of the '453 patent;

4 C. A declaration that this is an exceptional case under 35 U.S.C. § 285;

5 D. An award of costs and attorneys' fees to Implus; and

6 E. Such other relief as this Court or a jury may deem proper and just under
7 the circumstances.

8
9
10 Dated: May 16, 2022

Respectfully submitted,

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