

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA**

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)	
DARCO INTERNATIONAL, INC.)	
)	Civil Action
Plaintiff,)	
vs.)	No. <u>3:13-cv-28672</u> _____
)	
MEDICAL SPECIALTIES, INC.)	
)	
Defendant.)	DEMAND FOR JURY TRIAL
)	
_____)	

COMPLAINT FOR PATENT INFRINGEMENT

1. Plaintiff Darco International, Inc. (“Darco”), brings this action seeking monetary damages and injunctive relief against Defendant, Medical Specialties, Inc. (“MedSpec”), to remedy MedSpec’s infringement of United States Patent No. 8,226,589 (“the ‘589 patent”), in violation of the Patent Act of the United States, 35 U.S.C. 1 et seq., and the harm caused thereby.

For its Complaint against MedSpec, Darco alleges as follows:

PARTIES

2. Plaintiff Darco is a West Virginia corporation with its principal place of business at 810 Memorial Boulevard, Huntington, WV 25701.

3. Plaintiff Darco owns the entire right, title, and interest in United States Patent No. 8,226,589, described below, for a splint for dorsiflexing a toe.

4. On information and belief, Defendant Medical Specialties, Inc., is a North Carolina corporation having its principal place of business at 4600-K Lebanon Road, Charlotte, North Carolina 28227. Among other things, MedSpec sells and offers to sell orthopedic

products, including splints, in the Southern District of West Virginia (“the District”) and elsewhere in the United States.

JURISDICTION AND VENUE

Subject Matter Jurisdiction

5. This is an action arising under the Patent Act of the United States, 35 U.S.C. § 1 et seq.

6. This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1338(a).

Personal Jurisdiction

7. MedSpec directly, and/or through third parties, is doing business in this judicial district by selling, offering to sell, and/or otherwise making available infringing products such as, but not limited to, the Phantom™ Dorsal Night Splint (“the Dorsal Night Splint”).

8. On information and belief, Defendant is subject to personal jurisdiction in the Southern District of West Virginia, consistent with the principles of due process and the West Virginia Long Arm Statute, because Defendant has committed and continues to commit acts of infringement in violation of 35 U.S.C. § 271 and offers its products for sale in this District, has transacted business in this District, has committed and/or induced acts of patent infringement in this District, and/or has placed infringing products into the stream of commerce through established distribution channels with the expectation that such products will be purchased by residents of this District. These acts cause injury to Darco within this District.

9. Personal jurisdiction is also proper because, upon information and belief, Defendant has derived and continues to derive substantial revenue from the sale of infringing products distributed within this District, and/or expects, or should reasonably expect, their

actions to have consequences within the District and derive substantial revenue from interstate commerce and/or international commerce.

10. Accordingly, this Court has personal jurisdiction over the parties pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure and West Virginia Code § 56-3-33.

Venue

11. Venue is proper in this District under 28 U.S.C. §§ 1391(b), and (c) and 1400(b).

BACKGROUND

12. H. Darrel Darby, II (“Darby”) and Wu Zhang (“Zhang”), employees of Darco, conceived and developed a splint to dorsiflex a toe of the user including, among other things, a toe strap.

13. On April 18, 2008, Darby and Zhang filed a non-provisional patent Application No. 12/105,486 (“the ‘486 application”) for a United States Patent relating to this invention.

14. The ‘486 application was assigned to Darco on April 18, 2008 and recorded with the USPTO on April 18, 2008.

15. On July 24, 2012, the ‘486 application matured into United States Patent No. 8,226,589 entitled “Night Splint with Digital Dorsiflexion.”

16. A true and correct copy of the ‘589 patent is attached hereto as Exhibit A.

17. The ‘589 patent is directed to, among other things, an apparatus comprising a toe strap releasably connected to a splint which is configured to dorsiflex at least one toe of the user.

DESCRIPTION OF INFRINGING PRODUCTS

18. The Dorsal Night Splint is a splint which is configured to dorsiflex at least one toe of a user.

19. The Dorsal Night Splint includes a toe strap configured to retain a toe.

20. The toe strap has a connector at one end to releasably connect the toe strap to the splint frame, allowing the user to control the dorsiflexion of the toe.

21. The Dorsal Night Splint also includes a stretch adjustment portion on the splint frame with at least one connection point to releasably attach the connector of the toe strap.

22. An advertisement for the Dorsal Night Splint provides “the new Phantom now has a toe strap to provide greater tension on the plantar fascia.” See Exhibit B.

23. MedSpec advertises and offers for sale its Dorsal Night Splint on its website at <http://medspec.com/OnlineProducts.cfm?ID=123>.

24. MedSpec’s advertisement for the Dorsal Night Splint, which demonstrates a user wearing the splint, can be found at <http://medspec.com/OnlineProducts.cfm?ID=123>.

COUNT I: PATENT INFRINGEMENT

25. Darco incorporates by reference each and every allegation contained in paragraphs 1-24 as though fully set forth at length.

26. Plaintiff Darco owns all right, title, and interest in the ‘589 patent, including the right to sue thereon and the right to recover for infringement thereon, including the right to recover for past damages. The ‘589 patent was duly and legally issued on July 24, 2012, and a true and correct copy of the ‘589 is attached hereto as Exhibit A.

27. On information and belief, MedSpec has infringed and continues to infringe the ‘589 patent by making, using, selling, and/or offering to sell, within the United States and worldwide, splint devices including, but not limited to, the Dorsal Night Splint.

28. On information and belief, MedSpec, through the activities and products listed and described in the paragraph above, has infringed and is directly infringing the ‘589 patent, and is also aiding, abetting, and contributing to, and actively inducing infringement of the ‘589

patent by non-parties, including resellers, users, and customers, in the United States and countries foreign thereto, in violation of 35 U.S.C. §§ 271(a), (b), (c), and (f).

29. MedSpec's Dorsal Night Splint is not a staple article or commodity of commerce suitable for substantial non-infringing uses.

30. MedSpec has received written notice of the '589 patent at least as early as May 2013.

31. As a result of MedSpec's infringing activities, Darco has suffered, and will continue to suffer, substantial damages in an amount yet to be determined.

32. MedSpec's acts complained of herein have damaged and will continue to damage Darco irreparably. Darco has no adequate remedy at law for these wrongs and injuries. Darco is therefore entitled to a preliminary and permanent injunction restraining and enjoining MedSpec and its agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, from infringing the claims of the '589 patent.

33. MedSpec is not licensed or otherwise authorized to make, use, import, offer to sell, market, provide, or sell any product or method claimed in the '589 patent, and MedSpec's conduct is, in every instance, without Darco's consent.

34. MedSpec's infringement has been and continues to be willful.

PRAYER FOR RELIEF

WHEREFORE, Darco requests that this Court grant the following relief:

1. For a judgment declaring that Defendant has infringed and continues to infringe the asserted claims of the '589 patent;

2. For a judgment declaring that MedSpec's infringement of the '589 patent has been willful and deliberate;

3. For a judgment awarding Darco damages from MedSpec that are adequate to compensate for MedSpec's infringement, including interest and costs;
4. For a judgment awarding Darco treble damages under 35 U.S.C. § 284 as a result of MedSpec's willful and deliberate infringement of the of the '589 patent;
5. For a judgment declaring this case to be exceptional and award Darco its reasonable expenses, costs, and attorneys' fees in accordance with 35 U.S.C. §§ 284 and 285 and Rule 54(d) of the Federal Rules of Civil Procedure;
6. For a judgment granting Darco a preliminary and permanent injunction pursuant to 35 U.S.C. § 283, enjoining MedSpec, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from further infringement of the '589 patent; and
7. For a judgment awarding Darco such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Darco respectfully requests a trial by jury on all issues so triable.

DATED: November 11, 2013

DARCO INTERNATIONAL, INC.

By: Spilman Thomas & Battle, PLLC

/s/ Charles L. Woody

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