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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IMPACT APPLICATIONS, INC.,	)	
	)	
Plaintiff	)	Civil Action No.
	)	
vs.	)	JURY TRIAL DEMANDED
	)	
X2IMPACT, INC.,	)	
	)	
Defendant.	)	
	)	

**COMPLAINT FOR  
TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION**

Plaintiff, ImPACT Applications, Inc. ("IMPACT"), by and through its undersigned counsel, brings this Complaint for Trademark Infringement and Unfair Competition against Defendant X2IMPACT, Inc. ("X2").

**I. NATURE OF THE ACTION**

1. This is an action for trademark infringement, false designation of origin, false representation and description, and other unfair competitive conduct on the part of the Defendant in violation of the Lanham Act, 15 U.S.C. § 1051 et seq.; Sections 32 and 43(a) of the Lanham Act, 15 U.S.C. §§1114, and 1125(a), respectively; the Pennsylvania Trademark Act, 54 Pa.C.S. §§ 1101 et seq.; 54 Pa.C.S. § 1124; and Plaintiff's common law trademark and other rights. Plaintiff seeks permanent injunctive relief as well as other equitable relief and compensatory and punitive damages arising from Defendant's willful, unlawful, intentional, unfair, and misleading conduct and unjust enrichment.

## **II. THE PARTIES**

2. Plaintiff, IMPACT, is a Pennsylvania corporation with a principal place of business located at 2000 Technology Drive, Suite 150, Pittsburgh, Pennsylvania, 15219.

3. IMPACT's business operations include (i) the development and sale of software for neurocognitive testing, assessment, and evaluation for use in IMPACT's proprietary computerized neurocognitive evaluation system, and (ii) providing services associated with training for use of IMPACT's proprietary system (collectively referred to hereinafter as the "IMPACT Neurocognitive Evaluation Tools and Services").

4. IMPACT offers its IMPACT Neurocognitive Evaluation Tools and Services throughout the United States and abroad.

5. IMPACT is the owner of the following Pending and Registered Trademarks, referred to hereafter collectively as the "**IMPACT Marks**":

<b>MARK</b>	<b>REG NO. / REG DATE or APPN. NO./FILING DATE</b>	<b>GOODS / SERVICES</b>	<b>DATE OF FIRST USE IN INTERSTATE COMMERCE</b>
IMPACT	4,072,990 ("the '990 Mark")  Dec. 20, 2011	IC 009: Computer software for neurocognitive testing, assessment and evaluation.	June, 2000
		IC 041: Providing training, workshops, seminars and presentations for neurocognitive testing, assessment and evaluation.	June, 2000

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IMPACT	85/397,900 ("the '900 Application")  Aug. 15, 2011	IC 042: Providing temporary use of online non-downloadable computer software for neurocognitive testing, assessment and evaluation; computer software consulting.	Aug. 15, 2006
SIDELINE IMPACT	85/397,617 ("the '617 Application")  July 31, 2012	IC 009: Computer software for neurocognitive testing, assessment and evaluation; and computer application software for mobile phones and handheld computers, namely, for neurocognitive testing, assessment and evaluation  IC 041: Educational services, namely, providing training, workshops, seminars and presentations for neurocognitive testing, assessment and evaluation  IC 042: Providing temporary use of online non-downloadable computer software for neurocognitive testing, assessment and evaluation; Computer software consulting	Aug. 9, 2004  Aug. 9, 2004  Aug. 9, 2004

6. Copies of printouts from the United States Patent and Trademark Office ("USPTO") Web site that provide registration or application information for each of the **IMPACT Marks** are appended hereto as Exhibits A, B and C, respectively.

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7. The **IMPACT Marks** are all valid and subsisting.

8. In addition to the IMPACT Marks, beginning in at least June 2000 and continuing now, Plaintiff IMPACT continuously has been creating and developing a significant IMPACT brand build around the "IMPACT" name by using a portfolio of IMPACT-related trademarks and service marks on and in connection with its brand of neurocognitive evaluation tools, examples of which are attached hereto as Exhibit D.

9. Defendant X2 is, upon information and belief, an entity with a principal place of business at 837 N. 34<sup>th</sup> Street, Suite 210, Seattle, Washington 98103.

10. Upon further information and belief and based upon publicly available information from the Washington Secretary of State, Defendant is a corporation existing under the laws of the State of Washington and was incorporated on April 9, 2010.

11. Upon further information and belief, Defendant X2 adopted, used, and continues to use the following marks, collectively referred to as "the X2 Marks": X2IMPACT; and X2 SIDELINE.

12. Examples of Defendant's use of the X2 Marks are shown in Exhibit E. Defendant has used the X2 Marks in interstate and intrastate commerce in marketing and selling its neurocognitive evaluation products.

13. Upon further information and belief, Defendant X2 has used and continues to use the X2 Marks in connection with the sale, offering for sale, distribution, and advertising of its neurocognitive evaluation products.

14. Upon information and belief, the X2 Marks are identical to or confusingly similar to Plaintiff s **IMPACT Marks**.

### **III. JURISDICTION AND VENUE**

15. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. §§ 1114, 1116, 1121, and 1125(a), and 28 U.S.C. § 1331 and 1338(a) in that this action arises under the Lanham Act, 15 U.S.C. § 1051 et seq. This Court also has subject matter jurisdiction over the state and common law claims of trademark infringement and unfair competition averred herein pursuant to the provisions of 28 U.S.C. § 1338(b) in that the claims are joined with a substantial and related claim under the Lanham Act, 15 U.S.C. § 1051 et seq.

16. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) and (c) because, upon information and belief, Defendant is a corporation that is subject to personal jurisdiction in this Judicial District at the time of commencing this action and Defendant has conducted business and committed acts complained of in this Judicial District.

### **IV. FACTUAL ALLEGATIONS COMMON TO ALL COUNTS**

17. Since as early as about 2000, IMPACT has been using the trademark “IMPACT” on and in connection with its IMPACT Neurocognitive Evaluation Tools and Services, specifically its computer software and services associated with IMPACT’s neurocognitive testing, assessment, and evaluation, that it manufactures, distributes, and sells to distinguish IMPACT’s brand Neurocognitive Evaluation Tools and Services from those made, sold, and offered by others. IMPACT filed an application for registration of IMPACT in International Classes 009 and 041 in the USPTO on November 5, 2010, and the IMPACT mark was registered in the USPTO Principal Register on December 20, 2011, as the '990 Mark. *See* Exhibit A.

18. Since as early as about 2006, IMPACT has been using the trademark “IMPACT”

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on and in connection with its IMPACT Neurocognitive Evaluation Tools and Services, specifically its non-downloadable computer software for IMPACT's neurocognitive testing, assessment, and evaluation, that it manufactures, distributes, and sells to distinguish IMPACT's brand Neurocognitive Evaluation Tools and Services from those made, sold, and offered by others. IMPACT filed an application for registration of IMPACT in International Class 042 in the USPTO on August 15, 2011. This application is currently pending before the USPTO. A true and correct copy of the application as filed attached hereto as Exhibit B.

19. Since as early as about 2004, IMPACT has been using the "SIDELINE IMPACT" Mark on and in connection with its IMPACT Neurocognitive Evaluation Tools and Services that it manufactures, distributes, and sells to distinguish IMPACT's brand Neurocognitive Evaluation Tools and Services from those made, sold, and offered by others. IMPACT filed an application for registration of the SIDELINE IMPACT Mark in the USPTO on July 31, 2012. On September 25, 2012, the USPTO issued a notice of allowance, and on October 9, 2012, Applicant submitted a Statement of Use and Specimen for International Class 009. A true and correct copy of the application as filed, the statement of use, and specimen are attached hereto as Exhibit C.

20. IMPACT brand products sold in connection with the **IMPACT Marks** have gained significant recognition in the minds of physicians, nurses, athletic directors and trainers, and neuropsychologists throughout the United States and abroad as strong indicators of quality neurocognitive evaluation tools and services by reason of the longstanding and continuous use of the IMPACT Marks and through extensive promotion and marketing of the **IMPACT Marks** through literature, marketing materials, trade shows, exhibits, magazine advertisements, direct sales calls, trade press, and other media, such as the World Wide Web. As a result, the

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purchasing public has come to know, rely upon, and recognize the **IMPACT Marks** as indicating a source of high quality and reliable goods and services in the neurocognitive evaluation tool industry.

21. IMPACT has continuously used the **IMPACT Marks** to identify the IMPACT brand of IMPACT Neurocognitive Evaluation Tools.

22. Upon information and belief, the public has been given notice of the exclusive trademark rights in and to the **IMPACT Marks** by, for example prominently, displaying the registered trademark symbol "®" on the packaging, labels, literature, marketing materials, Web pages, and other advertising materials of the IMPACT Neurocognitive Evaluation Tools throughout the United States and abroad.

23. The **IMPACT Marks** are owned exclusively by IMPACT.

24. Defendant's use of the X2 Marks, which are identical or confusingly similar to Plaintiff's **IMPACT Marks**, has been and continues to be without authorization.

25. Upon information and belief, X2 has offered and continues to offer for sale, through its Web site ([www.x2impact.com](http://www.x2impact.com)) and its dealers and distributors, neurocognitive evaluation products that contain the X2 Marks which are identical to or confusingly similar to Impact's **IMPACT Marks**. Such neurocognitive evaluation products were not and are not distributed by IMPACT, the owner of the **IMPACT Marks**.

26. Upon information and belief, Defendant's use of the X2 Marks on the neurocognitive evaluation products that Defendant offers for sale is likely to confuse or to cause mistake or to deceive consumers to believe that the neurocognitive evaluation products offered by Defendant are produced, sponsored, or approved by IMPACT or that Defendant is affiliated or connected with IMPACT, all to the detriment of IMPACT.

**COUNT I**  
**FEDERAL TRADEMARK INFRINGEMENT PURSUANT TO 15 U.S.C. § 1114**

27. Plaintiff IMPACT incorporates by reference paragraphs 1 through 26 hereof as if the same were fully set forth herein.

28. The ‘990 Mark is valid and subsisting and provides IMPACT with the exclusive right to use the word “IMPACT” in commerce in the United States, the Commonwealth of Pennsylvania, and this Judicial District.

29. Defendant has infringed IMPACT’s ‘990 Mark in interstate commerce, in the Commonwealth of Pennsylvania, and within this Judicial District by various acts, including using in commerce reproductions, copies, or colorable imitations of the ‘990 Mark in connection with the sale, offering for sale, distribution, and/or advertising of neurocognitive evaluation products, all in violation of 15 U.S.C. § 1114(1)(a).

30. Defendants have also infringed IMPACT’s ‘990 Mark in interstate commerce, in the Commonwealth of Pennsylvania, and within this Judicial District, by reproducing, copying, or colorably imitating IMPACT’s ‘990 Mark and applying such reproduction, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of neurocognitive evaluation products, all in violation of 15 U.S.C. § 1114(1)(b).

31. Defendant's use of the ‘990 Mark is without permission or approval of IMPACT and such use by Defendant is likely to cause confusion, to cause mistake, and to deceive consumers as to the source of origin of the neurocognitive evaluation products

32. Consumers who purchase Defendant's neurocognitive evaluation products that bear the X2 Marks, believing the neurocognitive evaluation products to be sponsored, associated



with, or affiliated with IMPACT, are deceived and misled, thereby resulting in a loss of the goodwill in the '990 Mark and creating confusion, thus irreparably injuring IMPACT.

33. Upon information and belief, Defendant's continued use of X2 Marks is with the deliberate intention of trading on and benefiting from the valuable reputation and goodwill established in IMPACT's '990 Mark and gives the false impression that Defendant's products are associated with IMPACT.

34. IMPACT has no control over the quality of the neurocognitive evaluation products offered and sold by Defendant and, because of the confusion as to the source and false association with IMPACT engendered by Defendant, IMPACT's valuable goodwill with respect to the '990 Mark is at the mercy of Defendant unless such use is preliminarily and permanently enjoined.

35. Defendant's use of the X2 Marks is a deliberate, knowing, and willful infringement of IMPACT's statutory rights in the '990 Mark. Such acts have been undertaken in reckless and willful disregard for IMPACT's rights in the '990 Mark and have been designed specifically to trade upon the goodwill associated with IMPACT's '990 Mark.

**COUNT II**  
**FALSE DESIGNATION OF ORIGIN PURSUANT TO 15 U.S.C. § 1125(a)**

36. Plaintiff IMPACT incorporates by reference paragraphs 1 through 35 hereof as if the same were fully set forth herein.

37. Defendant's use of the X2 Marks in connection with selling its neurocognitive evaluation products creates the false designation of origin that such neurocognitive evaluation products emanate from IMPACT and falsely create the impression that IMPACT sponsors or approves of Defendant's products and falsely associates and affiliates Defendant with IMPACT

in violation of 15 U.S.C. § 1125(a). The unauthorized use of the X2 Marks in such a manner is intentionally designed to deceive prospective purchasers into believing that the neurocognitive evaluation products sold by Defendant and bearing the X2 Marks are sold by, originate from, or are endorsed by IMPACT. Defendant's use of the X2 Marks is likely to deceive consumers into believing that Defendant is in some way associated with, connected with, or related to IMPACT. Such use is likely to harm the reputation and goodwill of IMPACT.

38. IMPACT has no control over the quality of the neurocognitive evaluation products offered by Defendant. Defendant's reckless disregard for IMPACT's rights is harmful to the public and to the outstanding reputation of quality neurocognitive evaluation products associated with Plaintiff s **IMPACT Marks**.

39. Defendant's acts complained of herein violate Section 43(a) of The Lanham Act, 15 U.S.C. § 1125(a), and have been undertaken in reckless and willful disregard for IMPACT's rights and designed specifically to trade upon the goodwill associated with the **IMPACT Marks**.

40. Upon information and belief, Defendant has with knowledge of the falsity of the designations of origin, descriptions, and/or representations used in connection with the sale of neurocognitive evaluation products, caused them to be advertised, offered, and sold in interstate commerce to the immediate and irreparable damage of **IMPACT** and the public in violation of 15 U.S.C. § 1125(a).

**COUNT III**  
**UNFAIR COMPETITION PURSUANT TO 54 Pa.C.S. § 1124**

41. Plaintiff IMPACT incorporates by reference paragraphs 1 through 40 hereof as if the same were fully set forth herein.

42. By committing the acts herein alleged, including adoption of and use in commerce of the X2 Marks in connection with neurocognitive evaluation products, Defendant has unfairly appropriated the registered **IMPACT Marks**, and the reputation and goodwill associated therewith, and its actions in doing so constitute, among other things, unfair competition, infringement of registered and common law trademarks, deceptive advertising, unfair trade practices, and injury to IMPACT's reputation, all in violation of the common law and the laws of the Commonwealth of Pennsylvania, including at least 54 Pa.C.S. § 1124.

43. Defendant's acts complained of herein have been carried out in bad faith with full knowledge of IMPACT's valuable rights in the **IMPACT Marks**.

44. Defendant adopted the X2 Marks with malicious and reckless disregard of IMPACT's rights in and to the **IMPACT Marks** and with the willful intention to trade on IMPACT's reputation and goodwill. Exemplary and punitive damages are necessary by reason of Defendant's intentionally tortious conduct which has and will continue to cause damage to the rights of IMPACT in its **IMPACT Marks** and to the business reputation and goodwill of IMPACT, and are necessary to deter future similar conduct by Defendant.

**COUNT IV**  
**COMMON LAW TRADEMARK INFRINGEMENT**

45. Plaintiff IMPACT incorporates by reference paragraphs 1 through 44 hereof as if the same were fully set forth herein.

46. Defendant's acts as complained of herein have been intentionally undertaken in reckless and willful disregard for IMPACT's common law trademark rights and designed specifically to trade upon the goodwill associated with the **IMPACT Marks** in this judicial district.

47. Unless and until enjoined by this Court, the acts of Defendant complained of herein will continue unabated, all to the continuing damage and detriment of IMPACT, for which IMPACT has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff IMPACT respectfully requests the following relief:

A. that this Court grant a Permanent Injunction pursuant to 15 U.S.C. § 1116, enjoining and restraining Defendant and its agents, servants, employees, sales representatives, distributors, subsidiaries, heirs, successors and assigns, and all other persons acting by, through, or in active concert with any of them, from directly or indirectly using the X2 Marks, the **IMPACT Marks**, including any other marks, words, or names similar thereto which are likely to cause confusion, mistake, or to deceive;

B. that this Court grant a Permanent Injunction pursuant to 15 U.S.C. § 1116, enjoining and restraining Defendant and its agents servants, employees, sales representatives, distributors, subsidiaries, heirs, successors and assigns, and all other persons acting by, through, or in active concert with any of them, from engaging in any course of conduct likely to cause confusion, deception, or mistake, or to injure IMPACT's business reputation;

C. that this Court order pursuant to 15 § 1118 that all products, labels, signs, prints, pamphlets, wrappers, receptacles, banners, advertisements, goods, and counterfeits or colorable

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imitations in the possession of Defendant and its agents, servants, employees, sales representatives, distributors, subsidiaries, heirs, successors and assigns, and all other persons acting by, through, or in active concert with any of them bearing the X2 Marks or the **IMPACT Marks** shall be delivered up and destroyed;

D. that Defendants be required to account to and pay IMPACT for any and all profits derived from the sale of neurocognitive evaluation products bearing the X2 Marks or the **IMPACT Marks** and for all damages sustained by IMPACT by reason of said acts of infringement and unfair competition complained of herein and that said damages be trebled pursuant to 15 U.S.C. § 1117(b) and 54 Pa.C.S. § 1125(a) as a result of Defendant's willful violations of 15 U.S.C. § 1114(1)(a) and 54 Pa. C.S. § 1124;

E. that the Court award punitive and exemplary damages against Defendant by reason of Defendant's intentional and willful conduct and in favor of IMPACT;

F. that costs of this action, together with reasonable attorneys' fees, be awarded to IMPACT pursuant to 15 U.S.C. § 1117(a); and

G. that the Court grant such other and further relief as the Court deems just in the circumstances.

**DEMAND FOR JURY TRIAL**

**Jury trial demanded on all claims so triable.**

Dated this 17<sup>th</sup> day of October 2012.

Respectfully submitted,

PIETRAGALLO GORDON ALFANO BOSICK &  
RASPANTI, LLP

By: /s/Eric G. Soller

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