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8 Attorneys for Plaintiff,
ADDADAY LLC

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

13 Addaday LLC, a California
14 limited liability company,

15 Plaintiff,

16 v.

17 Hyper Ice, Inc., a California
18 corporation,

19 Defendant.

Case No.: 8:19-CV-01760

**VERIFIED COMPLAINT FOR
DECLARATORY JUDGMENT OF:**

- 1) **PATENT NONINFRINGEMENT;**
- 2) **PATENT INVALIDITY;**
- 3) **TRADE DRESS
NONINFRINGEMENT; AND**
- 4) **TRADE DRESS INVALIDITY.**

1 Plaintiff, Addaday LLC (“Addaday” or “Plaintiff”), for its Verified Complaint
2 for Declaratory Judgment against Defendant Hyper Ice, Inc. (“Hyper” or
3 “Defendant”) alleges as follows.

4 **JURISDICTION AND VENUE**

- 5 1) This Verified Complaint arises under the Federal Declaratory Judgment Act, 28
6 U.S.C. §§ 2201 & 2202 *et seq.* and the Patent laws of the United States, Title 35 of
7 the United States Code, 35 U.S.C § 100 *et seq.* This Court has subject matter
8 jurisdiction over this Verified Complaint pursuant to 28 U.S.C. §§1331 & 1338(a).
- 9 2) Venue is proper pursuant to 28 U.S.C. § 1391, as a substantial part of the events
10 described herein occurred in this judicial district, and Hyper Ice is subject to
11 personal jurisdiction in this judicial district, *inter alia*, because the effect of its
12 threatening Addaday with Patent Infringement takes place entirely within this
13 judicial district and Hyper Ice maintains a place of business at 15440 Laguna
14 Canyon Road, Suite 230, Irvine, California 92618, thus subjecting itself to the
15 jurisdiction and venue of this Honorable District Court.
- 16 3) This Verified Complaint sets forth four Claims for Declaratory Judgment pursuant
17 to 28 U.S.C. §§ 2201 & 2202 *et seq.*, in which Addaday desires a declaration of
18 rights in the form of a Judgment against Hyper.
- 19 4) An actual case and controversy exists between the Parties, in view of Hyper’s
20 September 13, 2019 letter to Addaday, which alleges that Addaday is infringing
21 certain Patent and Trademark rights allegedly held by Hyper, and said letter
22 explicitly threatens Addaday with litigation (“the September 13 Letter”). A true
23 and correct copy of the September 13, 2019 Letter is attached hereto as Exhibit A.

24 **PARTIES**

- 25 5) Addaday is a California limited liability company having a principal place of
26 business at 2500 Broadway, F125, Santa Monica, CA 90404.
- 27 6) On information and belief, Hyper is a California corporation having a principal
28 place of business at 15440 Laguna Canyon Road, Suite 230, Irvine CA 92618.

FACTUAL BACKGROUND

- 1
- 2 7) Since 2012, Addaday has provided a number of health and fitness products, many
3 focusing in the field of massage devices.
- 4 8) As early as 2013, people began affixing massage implementations to the heads of
5 jigsaw power tools, such that the jigsaw tools with the massage implementations
6 were capable of providing tissue massages.
- 7 9) Over the years, various entities adapted this jigsaw tool with massage
8 implementations into a “massage gun”, which has become an extremely popular
9 type of product, made and sold under many different brands by many companies.
- 10 10) Massage guns generally take the shape of a device having a main body, from
11 which a handle extends downward, and a massaging portion extends forward.
12 Many devices also comprise protrusions extending upward and rearward.
- 13 11) In 2018, Addaday introduced its own wired massage gun product, and in 2019
14 introduced its own wireless massage gun product, the Addaday BioZoom
15 Massager.
- 16 12) The Addaday BioZoom Massager follows the same general shape as the
17 numerous massage guns currently available, while incorporating significant
18 structural and design elements that differentiate it from the myriad of available
19 competitors.

20 **Hyper’s Alleged Patent And Trademark Rights**

- 21 13) According to the United States Patent Office, Hyper filed U.S. Design Patent
22 Application No. 29/637,855 on February 22, 2018, which issued into U.S. Design
23 Patent No. D855,822 on August 6, 2019 (“the Hyper Design Patent”). A true and
24 correct copy of the Hyper Design Patent is attached hereto as Exhibit B.
- 25 14) The Hyper Design Patent claims “[t]he ornamental design for a “percussive
26 massage device,” as shown and described.”
- 27 15) The only “percussive massage device” that is “shown and described” pursuant
28 to the claim is presented in Figures 1-8 of the Hyper Design Patent (*see* Exhibit B).

1 16) The Hyper Design Patent includes the disclaimer that “[t]he broken lines in the
2 drawings are for the purpose of illustrating portions of the percussive massage
3 device, which form no part of the claimed design” (*see* Exhibit B).

4 17) The only portion of the Figures of the Hyper Design Patent that are in broken
5 line format is the portion of the “percussive massage device” that engages a tip,
6 wherein the tip would comprise a mechanism for connecting to a massage
7 attachment.

8 18) In the September 13 Letter, Hyper alleges that it has a Trade Dress in the shape
9 of Hyper’s Hypervolt product. A true and correct copy of a representation of the
10 Hypervolt product is attached hereto as Exhibit C.

11 19) The Hypervolt product practices the Hyper Design Patent.

12 20) In the September 13 Letter, Hyper alleges that the Addaday BioZoom Massager
13 infringed both the Hyper Design Patent and Trade Dress owned by Hyper based on
14 the Hypervolt product.

15 21) Hyper alleges that it owns Trade Dress Rights in the shape of the Hypervolt
16 product.

17 22) Trade Dress is designed to identify the source of origin of goods, to assure
18 consistency of quality on repeat purchases, and to serve as an advertisement by
19 which a manufacturer can bypass individual retailers to reach consumers directly.
20 Additionally, Trade Dress protection may not be granted on a design that is
21 inherently functional. If found to be functional, the Trade Dress is invalid and
22 unenforceable.

23 23) The purpose of both Trademark and Patent protection is to enrich the
24 consuming public based on different considerations. “[A]ttempting to protect by
25 way of trademark the very same advances that were protected ... by patent [is an
26 attempt to] impermissibly ... extend the patent grant.” *Mech. Plastics Corp. v.*
27 *Titan Techs., Inc.*, 823 F. Supp. 1137, 1147 (S.D.N.Y. 1993). Put simply, it is
28 improper to protect by Trade Dress that which was previously protected by Patent.

1 24) The Hyper Design Patent and Hyper Trade Dress protect the same shape.

2 25) The September 13 Letter demands that Addaday “1. Immediately cease and
3 permanently desist the sale, marketing, advertising, production, manufacturing
4 and/or distribution of any product whatsoever whose configuration resembles, is
5 confusingly similar to, or infringes Hyperice’s intellectual property rights in the
6 HYPERVOLT; 2. Provide Hyperice with all records, financial and otherwise,
7 arising out of or related to your marketing, manufacturing, fabrication, purchasing,
8 sales, shipments of Addaday.com’s BioZoom, commencing with the date you first
9 engaged in the same in any market and in any media throughout the world; 3.
10 Reimburse Hyperice for its legal fees and costs in pursuing this matter; and 4.
11 Execute a Settlement Agreement which includes, inter alia, the foregoing and your
12 consent to exclusive jurisdiction, venue, injunctive relief, and a recovery of
13 attorneys’ fees for any violation thereof” (*see* Exhibit A).

14 26) In the September 13 Letter, Hyper stated that “it will file suit absent
15 [Addaday’s] written agreement to comply with the foregoing [demands] by the
16 close of business on Monday, September 23, 2019” (*see* Exhibit A).

17 27) Accordingly, Addaday is under a reasonable apprehension of lawsuit from
18 Hyper because Hyper has: (1) alleged that the Addaday BioZoom Massager
19 infringes the Hyper Design Patent and alleged Trade Dress in the same exact shape
20 covered by the Hyper Design Patent; and (2) threatened to file a lawsuit against
21 Addaday for infringement of the Hyper Design Patent and Trade Dress.

22 28) Addaday denies that any of its products infringe any claim of the Hyper Design
23 Patent, and makes this denial based on Addaday’s analysis of the Hyper Design
24 Patent and the Addaday BioZoom Massager.

25 29) To resolve the legal and factual questions raised by Hyper, and to afford relief
26 from the uncertainty that has precipitated, Addaday is entitled to a Declaratory
27 Judgment stating that Hyper is barred from asserting the Hyper Design Patent
28 against Addaday, that its products do not infringe any patent allegedly owned by

1 Hyper, and/or that the Hyper Design Patent.

2 30) Addaday also seeks reimbursement for its reasonable Attorneys' Fees and
3 Taxable Costs that have had to be expended as a result of Hyper's frivolous claims
4 of Patent Infringement of the Hyper Design Patent and Trade Dress Infringement.

5 31) As a result of Hyper's frivolous claims, Addaday has been forced to expend time
6 and money defending itself, through analysis of the allegations contained in the
7 September 13 Letter and preparation of this Verified Complaint by its Counsel.

8 32) Hyper's threat of litigation has been brought in subjective bad faith, and is
9 objectively baseless, because there is simply no way that the Addaday BioZoom
10 Massager infringes the Hyper Design Patent, and because Hyper claims both Patent
11 and Trade Dress protection in the exact same design, protections that should be
12 mutually exclusive.

13 33) Hyper's threat of litigation stands out from others with respect to the substantive
14 strength of Hyper's legal rights and position, because Hyper has no chance of
15 success, yet it attempts to coerce Addaday to comply with Hyper's unreasonable
16 and unwarranted demands.

17 34) Pursuant to 35 U.S.C. §285 and the line of cases starting with *Octane Fitness*
18 *LLC v. Icon Health & Fitness Inc.*, 572 U.S. ___, 134 S. Ct. 1749 (2014), and its
19 progeny, Addaday is entitled to receive reimbursement of its reasonable Attorneys'
20 Fees and Taxable Costs that have had to be expended and will continue to have to
21 be expended in the future to resolve this litigation, because the present litigation is
22 an exceptional case, given the clear non-infringement and Hyper's blatant attempt
23 to protect the exact same design by mutually exclusive protections of patent and
24 trademark.

25 **FIRST CLAIM FOR RELIEF**

26 **(Declaratory Judgment of Non-Infringement**

27 **of U.S. Design Patent Number D855,822)**

28 35) Addaday incorporates by reference each and every allegation set forth in the

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT: PATENT NONINFRINGEMENT;
PATENT INVALIDITY; TRADE DRESS NONINFRINGEMENT; AND TRADE DRESS INVALIDITY**

1 above 34 paragraphs as if fully set forth herein.

2 36) An actual controversy now exists between Addaday and Hyper, as to their
3 respective rights and responsibilities with respect to U.S. Design Patent No.
4 D855,822.

5 37) Hyper has alleged that Addaday has committed certain acts that infringe the
6 Hyper Design Patent, and Addaday denies that any of its products infringe any
7 claim of the Hyper Design Patent, either literally, directly, indirectly, under the
8 doctrine of equivalents, or by any other manner.

9 38) True and correct photographs of the Addaday BioZoom Massager mirroring
10 those views provided in the Hyper Design Patent are attached hereto as Exhibit D.

11 39) To resolve the legal and factual questions raised by Hyper and to afford relief
12 from the uncertainty that has precipitated, Addaday is entitled to a Declaratory
13 Judgment stating that Hyper is barred from asserting the Hyper Design Patent
14 against Addaday, that its product, the Addaday BioZoom Massager does not
15 infringe any patent allegedly owned by Hyper, and/or that the Hyper Design Patent
16 is invalid and/or unenforceable (at least as to Addaday itself).

17 **SECOND CLAIM FOR RELIEF**

18 **(Declaratory Judgment of Invalidity of**
19 **U.S. Design Patent Number D855,822)**

20 40) Addaday incorporates by reference each and every allegation set forth in the
21 above 39 paragraphs as if fully set forth herein.

22 41) An actual controversy now exists between Addaday and Hyper, as to their
23 respective rights and responsibilities with respect to U.S. Design Patent No.
24 D855,822.

25 42) To resolve the legal and factual questions raised by Hyper and to afford relief
26 from the uncertainty that has precipitated, Addaday is entitled to a Declaratory
27 Judgment stating that Hyper is barred from asserting the Hyper Design Patent
28 against Addaday, that its products do not infringe any patent allegedly owned by

1 Hyper, and/or that the Hyper Design Patent is invalid for failing to comply with all
2 of the requirements of 35 U.S.C. §§ 101, 102, 103, and/or 112 and/or the Hyper
3 Design Patent is unenforceable (at least as to Addaday itself).

4 **THIRD CLAIM FOR RELIEF**

5 **(Declaratory Judgment of Non-Infringement**
6 **of Hyper Trade Dress)**

7 43) Addaday incorporates by reference each and every allegation set forth in the
8 above 42 paragraphs as if fully set forth herein.

9 44) An actual controversy now exists between Addaday and Hyper, as to their
10 respective rights and responsibilities with respect to Hyper's alleged Trade Dress
11 rights to the Hypervolt Product shape.

12 45) Hyper has alleged that Addaday has committed certain acts that infringe the
13 Hyper Trade Dress, and Addaday denies that any of its products infringe any
14 protectible interest in any Hyper Trade Dress.

15 46) To resolve the legal and factual questions raised by Hyper and to afford relief
16 from the uncertainty that has precipitated, Addaday is entitled to a Declaratory
17 Judgment stating that Hyper is barred from asserting the alleged Hyper Trade
18 Dress against Addaday, that its product, the Addaday BioZoom Massager does not
19 infringe any Trade Dress allegedly owned by Hyper, and/or that the Hyper Trade
20 Dress is invalid and/or unenforceable (at least as to Addaday itself).

21 **FOURTH CLAIM FOR RELIEF**

22 **(Declaratory Judgment of Invalidity of**
23 **U.S. Design Patent Number D855,822)**

24 47) Addaday incorporates by reference each and every allegation set forth in the
25 above 46 paragraphs as if fully set forth herein.

26 48) An actual controversy now exists between Addaday and Hyper, as to their
27 respective rights and responsibilities with respect to the alleged Hyper Trade Dress.

28 49) The Hyper Trade Dress covers the same shape as that which is allegedly

1 protected by the Hyper Design Patent.

2 50) The Hyper Trade Dress allegedly protects functional aspects of the Hypervolt
3 product.

4 51) To resolve the legal and factual questions raised by Hyper and to afford relief
5 from the uncertainty that has precipitated, Addaday is entitled to a Declaratory
6 Judgment stating that Hyper is barred from asserting the Hyper Trade Dress
7 against Addaday, that its products do not infringe any Trade Dress allegedly owned
8 by Hyper, and/or that the Hyper Trade Dress is invalid for failing to meet the
9 requirements of a Trademark.

10 **PRAYER FOR RELIEF**

11 Addaday respectfully requests that a Declaratory Judgment be Entered in its
12 favor and against Hyper as follows:

13 A. For a Declaratory Judgment that none of Addaday's products, including the
14 Addaday BioZoom Massager infringe the Hyper Design Patent and/or any other
15 Patent allegedly owned by Hyper, and/or that the Hyper Design Patent is invalid
16 and/or unenforceable.

17 B. For a Permanent Injunction enjoining Hyper and their agents and attorneys from
18 further asserting rights pursuant to the Hyper Design Patent against Addaday
19 and/or its dealers and/or its customers.

20 C. For the recovery of Addaday's reasonable Attorneys' Fees and Taxable Costs
21 pursuant to 35 U.S.C. §285 and the *Octane Fitness* line of cases; and

22 D. For a Declaratory Judgment that none of Addaday's products, including the
23 Addaday BioZoom Massager infringe the Hyper Trade Dress and/or any other
24 Trademark allegedly owned by Hyper, and/or that the Hyper Trade Dress is
25 invalid and/or unenforceable.

26 E. For a Permanent Injunction enjoining Hyper and its agents and attorneys from
27 further asserting rights pursuant to the Hyper Trade Dress against Addaday
28 and/or its dealers and/or its customers.

1 F. For such additional and further relief in law and equity, as the court may deem
2 just and proper.

3 Respectfully submitted,
4 **HANKIN PATENT LAW, APC**

5 *Marc E. Hankin*

6 Dated: September 16, 2019

7 Marc E. Hankin
8 Attorneys for Plaintiff,
9 **ADDADAY LLC**

JURY TRIAL DEMANDED

1
2 Pursuant to Federal Rule of Civil Procedure 38(b) and Local Rule 3-6(a),
3 Plaintiff hereby demands a Trial by Jury as to all issues so triable.

4
5 Respectfully Submitted,
6 **HANKIN PATENT LAW, APC**

7 Date: September 16, 2019

8 By: /Marc E. Hankin/
9 Marc E. Hankin (SBN# 170505)
10 Attorney for Plaintiff,
11 **Addaday LLC**

VERIFICATION

1
2 I am a co-owner and Member of PLAINTIFF, ADDADAY LLC. I have read
3 the foregoing Verified Complaint and Exhibits thereto, and I know the contents
4 thereof. The same is true of my own personal knowledge, except for those matters
5 which have been stated herein on information and belief, and as to those matters, I
6 believe them to be true.

7 I declare under the penalties of perjury of the State of California and the United
8 States that the foregoing is true and correct. Executed at Santa Monica, California, on
9 September 16, 2019.

10
11 By:  _____
12 Victor Yang