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11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA

13	FITNESS IQ, LLC, a Delaware limited liability	)	CASE NO. <b>'11CV0160 BEN CAB</b>
14	company,	)	
15		)	<b>COMPLAINT AND DEMAND FOR</b>
	Plaintiff,	)	<b>JURY TRIAL</b>
16	vs.	)	
17	HSM IDEATV CORPORATION, a New Jersey	)	
18	corporation,	)	
19	Defendant.	)	

20 Plaintiff FITNESS IQ, LLC ( "Plaintiff" or "Fitness IQ") for its Complaint alleges as  
21 follows.

22 **NATURE OF THE ACTION**

23 1. This is an action for willful violations of Plaintiff's intellectual property rights,  
24 including trademark infringement, design patent infringement, trade dress infringement, and  
25 unfair competition, all arising out of Defendant's production, importation, distribution, sale, and  
26 offer for sale of its blatant counterfeits of Plaintiff's proprietary SHAKE WEIGHT® dumbbells.  
27

1 **THE PARTIES**

2 2. Plaintiff Fitness IQ is a limited liability company organized under the laws of the  
3 State of Delaware, having its principal place of business at 2387 La Miranda Drive, Vista,  
4 California 92081.

5 3. On information and belief, Defendant HSM IDEATV CORPORATION  
6 (“Defendant”) is a corporation organized under the laws of the State of New Jersey, having its  
7 principal place of business at 606 West 42nd Street, Suite 414, New York, New York 10036.

8 **JURISDICTION AND VENUE**

9 4. Jurisdiction of these claims arise under the patent laws of the United States as set  
10 forth in 35 U.S.C. § 271, *et seq.*, and under the trademark laws of the United States as set forth in  
11 the Lanham Act, 15 U.S.C. § 1051 *et seq.*

12 5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.  
13 § 1331 (federal question), 28 U.S.C. § 1332 (diversity), and 28 U.S.C. § 1338(a) (patents,  
14 trademarks, and trade dress).

15 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1) and (2) in that a  
16 substantial portion of the events giving rise to the claim occurred in this District, and Defendant  
17 does business in and therefore is deemed to reside in this District under 28 U.S.C. § 1391(c).  
18 This Court is also a proper venue pursuant to 28 U.S.C. § 1400(b) for the same reasons.

19 7. This Court has personal jurisdiction over the Defendant by virtue of the fact that it  
20 has availed itself of the forum by doing business here, by virtue of its actions of infringement by  
21 offers for sales and/or sales of infringing product to California customers, and by having  
22 conducted the acts giving rise to these claims in the State of California and the Southern District  
23 of California.

24 **FACTUAL ALLEGATIONS**

25 8. Since at least as early as July 25, 2009, Plaintiff has designed, manufactured,  
26 distributed, and extensively advertised its SHAKE WEIGHT® products in commerce.  
27 Plaintiff’s proprietary SHAKE WEIGHT® free weights are special pulsating dumbbells for  
28 shaping and toning the upper body, designed for a daily six-minute workout.

1           9.       Plaintiff is the owner of SHAKE WEIGHT®, United States Trademark  
2 Registration Nos. 3,702,459 (“the ‘459 Registration”) and 3,767,175 (“the ‘175 Registration”)  
3 for “manually-operated exercise equipment.” True and correct copies of the Trademark  
4 Applications and Registrations Retrieval (“TARR”) database records for the ‘459 Registration  
5 and the ‘175 Registration are attached hereto as Exhibit A and incorporated by reference.

6           10.       Plaintiff has applied for registration of the SHAKE trademark under United States  
7 Trademark Serial No. 77/980,964 (“the ‘964 Application”) for “manually-operated exercise  
8 equipment.” The United States Patent and Trademark Office (“USPTO”) issued a Notice of  
9 Allowance for the ‘964 Application on October 26, 2010. Plaintiff filed a Statement of Use with  
10 the USPTO for the ‘964 Application on November 15, 2010. The USPTO issued its Notice of  
11 Acceptance of the Statement of Use on January 19, 2011. A true and correct copy of the  
12 Trademark Applications and Registrations Retrieval (“TARR”) database record for the ‘964  
13 Application is attached hereto as Exhibit B and incorporated by reference.

14           11.       Plaintiff has also applied for registration of the SHAKE FITNESS trademark  
15 under United States Trademark Serial No. 77/902,804 (“the ‘804 Application”) for “manually-  
16 operated exercise equipment.” The USPTO issued a Notice of Allowance for the ‘804  
17 Application on November 2, 2010. A true and correct copy of the Trademark Applications and  
18 Registrations Retrieval (“TARR”) database record for the ‘804 Application is attached hereto as  
19 Exhibit C and incorporated by reference.

20           12.       On August 5, 2009, Plaintiff filed a design patent application with the USPTO for  
21 its SHAKE WEIGHT® dumbbells. On December 7, 2010, the USPTO issued United States  
22 Patent No. D628,660 (“the ‘660 Patent”) for “exercise device,” the SHAKE WEIGHT®  
23 dumbbell. The ‘660 Patent is valid and enforceable. A true and correct copy of the ‘660 Patent  
24 is attached hereto as Exhibit D and incorporated by reference.

25           13.       Since at least as early as July 25, 2009, Plaintiff has extensively advertised its  
26 SHAKE WEIGHT® dumbbells, especially in the form of commercials and infomercials seen on  
27 network television, cable television, and the Internet. Since its inception, Plaintiff has spent  
28 more than \$6.4 million to advertise SHAKE WEIGHT® dumbbells for women in direct response

1 television media, and more than \$2.7 million to advertise SHAKE WEIGHT® dumbbells for  
2 men in direct response television media. Tens of thousands of 60-second and 120-second  
3 SHAKE WEIGHT® television spots have aired. The SHAKE WEIGHT® dumbbells and  
4 commercials have been so popular that they have been referenced extensively in the media and  
5 popular culture.

6 14. On August 3, 2009, hostess Whoopi Goldberg introduced a clip from the SHAKE  
7 WEIGHT® dumbbells for women infomercial on the show “The View.”

8 15. On August 7, 2009, host Jimmy Kimmel incorporated a clip from the SHAKE  
9 WEIGHT® dumbbells for women infomercial in his monologue on the show “Jimmy Kimmel  
10 Live.”

11 16. On September 15, 2009, host Ellen DeGeneres aired a clip from the SHAKE  
12 WEIGHT® dumbbells for women infomercial on her show “Ellen.” The dumbbells were so well  
13 received that she aired that clip again the next day, on September 16, 2009, where Ms.  
14 DeGeneres demonstrated her own use of the SHAKE WEIGHT® dumbbell as well as a whole  
15 crew using the SHAKE WEIGHT® dumbbells. Since September 2009, the SHAKE WEIGHT®  
16 has appeared on the Ellen show more than six times. Ms. DeGeneres has continually promoted  
17 the SHAKE WEIGHT® dumbbells, having given the product as a gift to celebrities Queen  
18 Latifah and Jason Bateman while they were on her show.

19 17. On October 27, 2009, a clip from the SHAKE WEIGHT® dumbbells for men  
20 infomercial was featured in the “Moment of Zen” segment on “The Daily Show” with Jon  
21 Stewart.

22 18. On April 17, 2010, the comedians on the show “Saturday Night Live” parodied  
23 the SHAKE WEIGHT® commercial.

24 19. On September 21, 2010, host Jimmy Fallon also aired the SHAKE WEIGHT®  
25 dumbbells for men infomercial on his show, “Late Night with Jimmy Fallon.” He discussed the  
26 SHAKE WEIGHT® product with his guest, actress Emma Stone.

27 20. On September 21, 2010, ESPN featured the SHAKE WEIGHT® dumbbells for  
28 men product in its own (ESPN’s) commercial during its “Sunday NFL Countdown with Adam &

1 Mort” show. In ESPN’s commercial, NFL player Dwight Freeney was shown to have a SHAKE  
2 WEIGHT® for men in his fictional garage.

3 21. In addition to the television shows documented above, the SHAKE WEIGHT®  
4 dumbbells have also been featured in HBO’s “Hard Knocks,” Comedy Central’s “South Park,”  
5 CBS’s “Two and a Half Men,” and the David Letterman show.

6 22. Since July 2009, sales for the SHAKE WEIGHT® dumbbells have exceeded \$60  
7 million. Through these sales and extensive and widespread publicity as exemplified above,  
8 Plaintiff has developed substantial secondary meaning in the design of its SHAKE WEIGHT®  
9 dumbbells.

10 23. On or around December 2010, Plaintiff became aware that Defendant was selling  
11 knock-offs of the SHAKE WEIGHT® dumbbells under the mark “Fitness Shake.” On or around  
12 December 15, 2010, Plaintiff sent a cease and desist letter to Defendant, informing Defendant of  
13 its intellectual property rights in the SHAKE WEIGHT® dumbbells. A true and correct copy of  
14 this letter is attached as Exhibit E and incorporated by reference.

15 24. On or around December 17, 2010, Defendant responded in writing by email to  
16 Plaintiff’s counsel, claiming that Defendant has “ceased all activities relating to the sale, offering  
17 for sale or distribution” of the “Fitness Shake” dumbbells. A true and correct copy of this email  
18 is attached as Exhibit F and incorporated by reference.

19 25. Despite Defendant’s representation that it would no longer sell, offer for sale, or  
20 distribute the “Fitness Shake” dumbbells, Plaintiff has been informed and believes that  
21 Defendant has nevertheless continued to do so. On or around the beginning of December 2010,  
22 the Midwest home improvement store chain Menards indicated that it intended to place an order  
23 of 200,000 units of SHAKE WEIGHT® dumbbells from Plaintiff through Plaintiff’s agent.  
24 However, on or around December 14, 2010, the Menards buyer informed Plaintiff’s agent that  
25 unless Plaintiff lowered its price for SHAKE WEIGHT® dumbbells, Menards would buy the  
26 cheaper “Fitness Shake” dumbbells from Defendant. On or around January 19, 2011, Plaintiff  
27 discovered that Menards will not proceed with the prospective order of SHAKE WEIGHT®  
28 dumbbells, and has instead ordered the cheaper “Fitness Shake” dumbbells from Defendant. On

1 information and belief, some time in the beginning of January, Menards has placed an order with  
2 Defendant for 180,000 units of the “Fitness Shake” dumbbell (an estimated retail value of  
3 \$1,800,000) with the target delivery date some time during the first week of March, 2011.

4 26. The design and trade dress of the SHAKE WEIGHT® dumbbells for women  
5 include without limitation a contoured handle, stylized indentations in the handle, two flexible  
6 boots which are located between the handle and a recessed groove of the end weights, two  
7 cylindrical end weights, and reflective surfaces on the end weights. The end weights feature an  
8 inner circle on their ends and an outer ring surface.

9 27. The “Fitness Shake” dumbbells are clear knock-offs of the SHAKE WEIGHT®  
10 dumbbells. The “Fitness Shake” dumbbells are approximately the same size and weight of the  
11 SHAKE WEIGHT® dumbbells. The “Fitness Shake” dumbbell also consists of a contoured  
12 handle, stylized indentations in the handle, two flexible boots which are located between the  
13 handle and a recessed groove of the end weights, two cylindrical end weights that feature an  
14 inner circle on their ends and an outer ring surface, and reflective surfaces on the end weights.  
15 The only perceivable differences are that the “Fitness Shake” dumbbell contains indentations in  
16 the handle that run parallel, rather than perpendicular, to the end weights; and that the “Fitness  
17 Shake” dumbbell is of a cheaper, inferior quality.

18 **FIRST CLAIM FOR RELIEF**

19 **Infringement of United States Design Patent No. D628,660**

20 28. Plaintiff incorporates and re-alleges herein as if set forth at length the allegations  
21 of the preceding paragraphs above.

22 29. Plaintiff is the owner of United States Patent No. D628,660 (“the ‘660 Patent”)  
23 for “exercise device,” the SHAKE WEIGHT® dumbbell. The ‘660 Patent is valid and  
24 enforceable.

25 30. Defendant has designed, manufactured, distributed, and/or imported its “Fitness  
26 Shake” dumbbells. On information and belief, the overwhelming similarities between the  
27 “Fitness Shake” and Plaintiff’s proprietary SHAKE WEIGHT® dumbbells were meant to  
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1 capitalize on the popularity of Plaintiff’s proprietary SHAKE WEIGHT® dumbbells and its  
2 unique and distinctive design.

3 31. Defendant’s “Fitness Shake” dumbbells infringe upon the ‘660 Patent, as an  
4 ordinary observer would be deceived into believing that the “Fitness Shake” dumbbells are the  
5 same as the patented SHAKE WEIGHT® dumbbell design. The overall appearance of the  
6 “Fitness Shake” dumbbells are deceptively similar to the overall appearance of Plaintiff’s  
7 proprietary SHAKE WEIGHT® dumbbells.

8 32. Defendant’s infringing acts constitute a violation of 35 U.S.C. § 271(a).

9 33. As a result of Defendant’s infringing acts, Plaintiff has been injured in an amount  
10 not yet fully determined, but believed to be in excess of \$75,000, exclusive of costs and interests.  
11 In addition, as a result of Defendant’s infringing acts, Plaintiff has suffered and will continue to  
12 suffer irreparable harm, and Plaintiff has no adequate remedy at law with respect to this injury.  
13 Unless Defendant’s infringing acts are enjoined by this Court, Plaintiff will continue to suffer a  
14 risk of irreparable harm.

15 34. On information and belief, Defendant’s infringing acts have been knowing,  
16 intentional, wanton, and willful, entitling Plaintiff to treble damages, profits, attorneys fees and  
17 costs pursuant to 35 U.S.C. § 284 in this Court’s discretion.

18 **SECOND CLAIM FOR RELIEF**

19 **Trade Dress Infringement Under 15 U.S.C. § 1125(a)**

20 35. Plaintiff incorporates and re-alleges herein as if set forth at length the allegations  
21 of the preceding paragraphs above.

22 36. Plaintiff’s SHAKE WEIGHT® dumbbell and the product packaging  
23 accompanying the SHAKE WEIGHT® dumbbell constitute protectable trade dress under the  
24 Lanham Act, 15 U.S.C. § 1125(a). The trade dress of the SHAKE WEIGHT® for women  
25 dumbbell includes without limitation a contoured handle, stylized indentations in the handle, two  
26 flexible boots which are located between the handle and a recessed groove of the end weights,  
27 and two cylindrical end weights. The end weights feature an inner circle on their ends and an  
28 outer ring surface.

1 37. The trade dress of Plaintiff's SHAKE WEIGHT® dumbbell is not functional.

2 38. Defendant's acts of designing or having designed, manufacturing or having  
3 manufactured, selling, distributing, and/or importing the "Fitness Shake" products in interstate  
4 commerce, without Plaintiff's consent, constitutes infringement of Plaintiff's trade dress, and has  
5 caused and continues to cause a likelihood of confusion, mistake, and deception as to source,  
6 sponsorship, affiliation, and/or connection in the minds of the public, in violation of the Lanham  
7 Act, 15 U.S.C. § 1125(a).

8 39. As a result of Defendant's infringing acts, Plaintiff has been injured in an amount  
9 not yet fully determined, but believed to be in excess of \$75,000, exclusive of costs and interests.  
10 In addition, as a result of Defendant's infringing acts, Plaintiff has suffered and will continue to  
11 suffer irreparable harm, and Plaintiff has no adequate remedy at law with respect to this injury.  
12 Unless Defendant's infringing acts are enjoined by this Court, Plaintiff will continue to suffer a  
13 risk of irreparable harm.

14 40. On information and belief, Defendant's infringing acts have been knowing,  
15 intentional, wanton, and willful, entitling Plaintiff to treble damages, profits, attorneys fees and  
16 costs pursuant to 15 U.S.C. § 1117 in this Court's discretion.

17 **THIRD CLAIM FOR RELIEF**

18 **Trademark Infringement Under 15 U.S.C. § 1114(a)**

19 41. Plaintiff incorporates and re-alleges herein as if set forth at length the allegations  
20 of the preceding paragraphs above.

21 42. Plaintiff is the owner of the '459 Registration and the '175 Registration for  
22 SHAKE WEIGHT® in association with "manually-operated exercise equipment," the SHAKE  
23 WEIGHT® dumbbells.

24 43. Defendant's acts of designing or having designed, manufacturing or having  
25 manufactured, selling, distributing, and/or importing the "Fitness Shake" dumbbells in interstate  
26 commerce, without Plaintiff's consent, constitutes infringement of Plaintiff's registered  
27 trademarks, and has caused and continues to cause a likelihood of confusion, mistake, and  
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1 deception as to source, sponsorship, affiliation, and/or connection in the minds of the public, in  
2 violation of the Lanham Act, 15 U.S.C. § 1114(a).

3 44. As a result of Defendant's infringing acts, Plaintiff has been injured in an amount  
4 not yet fully determined, but believed to be in excess of \$75,000, exclusive of costs and interests.  
5 In addition, as a result of Defendant's infringing acts, Plaintiff has suffered and will continue to  
6 suffer irreparable harm, and Plaintiff has no adequate remedy at law with respect to this injury.  
7 Unless Defendant's infringing acts are enjoined by this Court, Plaintiff will continue to suffer a  
8 risk of irreparable harm.

9 45. On information and belief, Defendant's infringing acts have been knowing,  
10 intentional, wanton, and willful, entitling Plaintiff to treble damages, profits, attorneys fees and  
11 costs pursuant to 15 U.S.C. § 1117 in this Court's discretion.

12 **FOURTH CLAIM FOR RELIEF**

13 **Trademark Infringement and False Designation of Origin Under 15 U.S.C. § 1125(a)**

14 46. Plaintiff incorporates and re-alleges herein as if set forth at length the allegations  
15 of the preceding paragraphs above.

16 47. Plaintiff is the owner of the valid trademark SHAKE™ in association with  
17 "manually-operated exercise equipment" through priority of use in commerce and/or through  
18 acquisition of secondary meaning.

19 48. Defendant's acts of designing or having designed, manufacturing or having  
20 manufactured, selling, distributing, and/or importing the "Fitness Shake" dumbbells in interstate  
21 commerce, without Plaintiff's consent, constitutes infringement of Plaintiff's SHAKE™  
22 trademark, and has caused and continues to cause a likelihood of confusion, mistake, and  
23 deception as to source, sponsorship, affiliation, and/or connection in the minds of the public, in  
24 violation of 15 U.S.C. § 1125(a).

25 49. As a result of Defendant's infringing acts, Plaintiff has been injured in an amount  
26 not yet fully determined, but believed to be in excess of \$75,000, exclusive of costs and interests.  
27 In addition, as a result of Defendant's infringing acts, Plaintiff has suffered and will continue to  
28 suffer irreparable harm, and Plaintiff has no adequate remedy at law with respect to this injury.

1 Unless Defendant’s infringing acts are enjoined by this Court, Plaintiff will continue to suffer a  
2 risk of irreparable harm.

3 50. On information and belief, Defendant’s infringing acts have been knowing,  
4 intentional, wanton, and willful, entitling Plaintiff to treble damages, profits, attorneys fees and  
5 costs pursuant to 15 U.S.C. § 1117 in this Court’s discretion.

6 **FIFTH CLAIM FOR RELIEF**

7 **Trademark Infringement Under Cal. Bus. & Prof. Code § 14200 *et seq.***

8 51. Plaintiff incorporates and re-alleges herein as if set forth at length the allegations  
9 of the preceding paragraphs above.

10 52. Plaintiff is the owner of the SHAKE WEIGHT, SHAKE WEIGHT + design, and  
11 SHAKE trademarks for “manually-operated exercise equipment.” The SHAKE WEIGHT,  
12 SHAKE WEIGHT + design, and SHAKE trademarks constitute “Marks” as defined by Cal. Bus.  
13 & Prof. Code § 14202.

14 53. Defendant’s acts of designing or having designed, manufacturing or having  
15 manufactured, selling, distributing, and/or importing the “Fitness Shake” dumbbells in interstate  
16 commerce, without Plaintiff’s consent, constitutes infringement of Plaintiff’s Marks, and has  
17 caused and continues to cause a likelihood of confusion, mistake, and deception as to source,  
18 sponsorship, affiliation, and/or connection in the minds of the public, in violation of Cal. Bus. &  
19 Prof. Code § 14200 *et seq.*

20 54. As a result of Defendant’s infringing acts, Plaintiff has been injured in an amount  
21 not yet fully determined, but believed to be in excess of \$75,000, exclusive of costs and interests.  
22 In addition, as a result of Defendant’s infringing acts, Plaintiff has suffered and will continue to  
23 suffer irreparable harm, and Plaintiff has no adequate remedy at law with respect to this injury.  
24 Unless Defendant’s infringing acts are enjoined by this Court, Plaintiff will continue to suffer a  
25 risk of irreparable harm.

26 55. On information and belief, Defendant’s infringing acts have been knowing,  
27 intentional, wanton, and willful, entitling Plaintiff to treble damages, profits, attorneys fees and  
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1 costs pursuant to Cal. Civ. Code § 3294 and Cal. Bus. & Prof. Code § 14250(a) in this Court's  
2 discretion.

3 **SIXTH CLAIM FOR RELIEF**

4 **Unfair Competition Under Cal. Bus. & Prof. Code § 17200 *et seq.***

5 56. Plaintiff incorporates and re-alleges herein as if set forth at length the allegations  
6 of the preceding paragraphs above.

7 57. California Business & Professions Code § 17200 provides that unfair competition  
8 means and includes "any unlawful, unfair or fraudulent business act or practice and unfair,  
9 deceptive, untrue, or misleading advertising."

10 58. By and through Defendant's conduct, including the conduct detailed above,  
11 Defendant has engaged in activities that constitute unlawful, unfair, and fraudulent business  
12 practices prohibited by Business & Professions Code § 17200 *et seq.*

13 59. Defendant's acts of intentional and willful trademark, trade dress, and design  
14 patent infringement as alleged above constitute unfair competition actionable under the laws of  
15 the State of California as unlawful business acts or practices in that, *inter alia*, said acts violate  
16 the United States patent laws, 35 U.S.C. § 271 *et seq.* and the Lanham Act, 15 U.S.C.  
17 §§ 1114(a), 1125(a), and Cal. Bus. & Prof. Code § 14200 *et seq.*

18 60. Defendant's acts of intentional and willful trademark, trade dress, and design  
19 patent infringement as alleged above constitute unfair competition actionable under the laws of  
20 the State of California as unfair business acts or practices in that, *inter alia*, said acts of  
21 producing knock-offs of Plaintiff's proprietary SHAKE WEIGHT® dumbbells in order to  
22 appropriate the substantial value of Plaintiff's investment and effort in design and marketing  
23 without paying for it and then underselling these products in direct competition with Plaintiffs  
24 SHAKE WEIGHT® dumbbells are immoral, unethical, oppressive, and unscrupulous.

25 61. Defendant's acts of intentional and willful trademark, trade dress, and design  
26 patent infringement as alleged above constitute unfair competition actionable under the laws of  
27 the State of California as fraudulent business acts of practices in that, *inter alia*, said acts are  
28 likely to confuse the public as to the origin of the infringing products.



1 70. Plaintiff’s SHAKE WEIGHT® dumbbells and Defendant’s “Fitness Shake”  
2 dumbbells are in direct competition.

3 71. As a result of Defendant’s infringing acts, Plaintiff has been injured in an amount  
4 not yet fully determined, but believed to be in excess of \$75,000, exclusive of costs and interests.  
5 In addition, as a result of Defendant’s infringing acts, Plaintiff has suffered and will continue to  
6 suffer irreparable harm, and Plaintiff has no adequate remedy at law with respect to this injury.  
7 Unless Defendant’s infringing acts are enjoined by this Court, Plaintiff will continue to suffer a  
8 risk of irreparable harm.

9 72. On information and belief, Defendant has acted in conscious disregard of  
10 Plaintiff’s rights, entitling Plaintiff to punitive damages in this Court’s discretion.

11 **RELIEF REQUESTED**

12 WHEREFORE, Plaintiff respectfully requests that this Court grant relief as follows:

- 13 a. Judgment in favor of Plaintiff on all claims herein;
- 14 b. A temporary restraining order, and a preliminary and permanent injunction  
15 preventing Defendant and those additional parties specified in Federal Rule of Civil Procedure  
16 Rule 65(d) from continued infringement of Plaintiff’s intellectual property rights, including  
17 trademarks, common law trade dress, and design patent, United States Patent No. D628,660 (“the  
18 ‘660 Patent”), and any and continued unfair competition;
- 19 c. An accounting of profits and damages resulting from Defendant’s trade dress and  
20 design patent infringement and unfair competition, and trebling of such damages for the  
21 knowing, intentional, willful, and wanton nature of Defendant’s conduct;
- 22 d. On the trademark and trade dress infringement claims, an award to Plaintiff of (i)  
23 an amount equal to the actual damages suffered by Plaintiff as a result of the infringement of its  
24 proprietary trade dress; (ii) an amount equal to the profits earned by Defendant as a result of its  
25 infringing creation, design, distribution, packaging, and sales, or as a result of Defendant’s  
26 purchase and re-sale of their infringing products; (iii) an amount equal to three times the  
27 monetary award assessed in view of Defendant’s willful and wanton infringement under 15  
28 U.S.C. § 1117; (iv) prejudgment and post-judgment interest; (v) an amount equal to Plaintiff’s

1 reasonable attorneys fees, on the basis that this action is an “exceptional” case under 15 U.S.C.  
2 § 1117;

3 e. On the design patent infringement claim, an award to Plaintiff of (i) an amount  
4 equal to the actual damages suffered by Plaintiff as a result of the infringement of its design  
5 patent, but no less than a reasonable royalty for the use made by Defendant of the infringing  
6 product; (ii) an amount equal to the profits earned by Defendant as a result of its infringing  
7 creation, design, distribution, packaging, and sales, or as a result of Defendant’s purchase and re-  
8 sale of their infringing products; (iii) an amount equal to three times the monetary award  
9 assessed in view of Defendant’s willful and wanton infringement under 35 U.S.C. § 384; (iv)  
10 prejudgment and post-judgment interest; (v) an amount equal to Plaintiff’s reasonable attorneys  
11 fees, on the basis that this action is an “exceptional” case under 35 U.S.C. § 385;

12 f. An award to Plaintiff any additional remedies from infringement of the ‘660  
13 Patent by Defendant as provided in 35 U.S.C. § 289;

14 g. On the California trademark infringement claim, (i) an amount equal to up to  
15 three times the profits earned by Defendant as a result of its infringing creation, design,  
16 distribution, packaging, and sales, or as a result of Defendant’s purchase and re-sale of their  
17 infringing products, (ii) an amount equal to up to three times the damages suffered by Plaintiff as  
18 a result of Defendant’s infringing creation, design, distribution, packaging, and sales, or as a  
19 result of Defendant’s purchase and re-sale of their infringing products, and (iii) destruction  
20 and/or recall of all materials bearing the infringing mark from the market;

21 h. On the common law unfair competition claim, compensatory and punitive  
22 damages;

23 i. Disgorgement of all profits and restitution made in connection or associated with  
24 the sale of the infringing products under California Business & Professions Code § 17200 *et seq.*;

25 j. An order for the seizure and forfeiture of all goods infringing upon Plaintiff’s  
26 trademarks, the ‘660 Patent, and SHAKE WEIGHT® trade dress and trademark upon delivery  
27 into the United States pursuant to 19 U.S.C. § 1337;

28 k. An award of punitive damages for intentional and willful acts;

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- l. An award of interest, attorneys fees and costs; and
- m. Such other and further relief as the Court deems proper.

Dated: January 25, 2011

Respectfully submitted,  
GORDON & REES LLP

by /s/Richard P. Sybert  
Richard P. Sybert  
Yuo-Fong C. Amato  
Attorneys for Plaintiff  
FITNESS IQ, LLC

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**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury for all claims triable by a jury.

Dated: January 25, 2011

Respectfully submitted,  
GORDON & REES LLP

by /s/Richard P. Sybert  
Richard P. Sybert  
Yuo-Fong C. Amato  
Attorneys for Plaintiff  
FITNESS IQ, LLC



JS 44 (Rev. 12/07)

### CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<b>I. (a) PLAINTIFFS</b> Fitness IQ, LLC	<b>DEFENDANTS</b> HSM IdeaTV Corporation
<b>(b) County of Residence of First Listed Plaintiff</b> <u>San Diego</u> (EXCEPT IN U.S. PLAINTIFF CASES)	County of Residence of First Listed Defendant <u>New York</u> (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.
<b>(c) Attorney's (Firm Name, Address, and Telephone Number)</b> Richard P. Sybert Yuo-Fong C. Amato Gordon & Rees LLP 101 West Broadway, Suite 1600 San Diego, California 92101 (619)696-6700	Attorneys (If Known)  <div style="border: 1px solid black; padding: 5px; display: inline-block;">                     '11CV0160 BEN CAB                 </div>

<b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)																				
<input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<table style="width:100%; border-collapse: collapse;"> <tr> <td style="text-align: center;"><b>PTF</b></td> <td style="text-align: center;"><b>DEF</b></td> <td></td> <td style="text-align: center;"><b>PTF</b></td> <td style="text-align: center;"><b>DEF</b></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>	<b>PTF</b>	<b>DEF</b>		<b>PTF</b>	<b>DEF</b>	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Citizen of This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Citizen of Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 6	<input type="checkbox"/> 6
<b>PTF</b>	<b>DEF</b>		<b>PTF</b>	<b>DEF</b>																	
<input type="checkbox"/> 1	<input type="checkbox"/> 1	Citizen of This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4																	
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<input type="checkbox"/> 3	<input type="checkbox"/> 3	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 6	<input type="checkbox"/> 6																	

IV. NATURE OF SUIT (Place an "X" in One Box Only)						
<b>CONTRACT</b> <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>TORTS</b> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:50%; vertical-align: top;"> <b>PERSONAL INJURY</b>  <input type="checkbox"/> 310 Airplane  <input type="checkbox"/> 315 Airplane Product Liability  <input type="checkbox"/> 320 Assault, Libel &amp; Slander  <input type="checkbox"/> 330 Federal Employers' Liability  <input type="checkbox"/> 340 Marine  <input type="checkbox"/> 345 Marine Product Liability  <input type="checkbox"/> 350 Motor Vehicle  <input type="checkbox"/> 355 Motor Vehicle Product Liability  <input type="checkbox"/> 360 Other Personal Injury                 </td> <td style="width:50%; vertical-align: top;"> <b>PERSONAL INJURY</b>  <input type="checkbox"/> 362 Personal Injury—Med. Malpractice  <input type="checkbox"/> 365 Personal Injury—Product Liability  <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability  <b>PERSONAL PROPERTY</b>  <input type="checkbox"/> 370 Other Fraud  <input type="checkbox"/> 371 Truth in Lending  <input type="checkbox"/> 380 Other Personal Property Damage  <input type="checkbox"/> 385 Property Damage Product Liability                 </td> </tr> </table>	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<b>FORFEITURE/PENALTY</b> <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<b>BANKRUPTCY</b> <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input checked="" type="checkbox"/> 830 Patent <input type="checkbox"/> 830 Patent	<b>OTHER STATUTES</b> <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability					
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

**V. ORIGIN** (Place an "X" in One Box Only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
35 U.S.C. § 271

Brief description of cause:  
Infringement of Design Patent

**VII. REQUESTED IN COMPLAINT:**  CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** \_\_\_\_\_

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY** (See instructions): JUDGE Hon. Marilyn L. Huff DOCKET NUMBER 10-cv-2584

DATE: January 25, 2011 SIGNATURE OF ATTORNEY OF RECORD: s/Richard P. Sybert

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_



**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44****Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

**(b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

**(c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.