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9 Attorneys for Plaintiff
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11
12 **UNITED STATES DISTRICT COURT**
13
14 **FOR NORTHERN DISTRICT OF CALIFORNIA**
15
16 **SAN FRANCISCO DIVISION**

17 CONVEX PROMOTIONS, INC., a
18 Delaware corporation,

19 Plaintiff,

20 vs.

21 ACQUIRE, INC., a California corporation,
22 Defendant.

CASE NO.

COMPLAINT

[DEMAND FOR JURY TRIAL]

23 Plaintiff Convex Promotions, Inc. (“Convex” or “Plaintiff”), by its attorneys, hereby sues and
24 seeks from Defendant Acquire, Inc. (“Acquire” or “Defendant”) an accounting for and an amount no
25 less than One Hundred Million Dollars (\$100,000,000.00) in compensatory and punitive damages,
26 together with preliminary and permanent injunctive relief and attorneys’ fees, based upon Defendant’s
27 willful acts of patent infringement, fraud, unfair competition, false advertising and false designation of
28 origin. Acquire has infringed and continues to infringe United States Patent Nos. 6,070,752; 6,196,411;
6,464,072; 6,481,573; 6,604,629; and 6,647,696 (collectively the “Lid Patents”).

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1 The following statements made with respect to the Defendant are made upon information and
2 belief; and statements made regarding the Plaintiff are based upon personal knowledge as well as the
3 best available information and belief.

4 **JURISDICTION AND VENUE**

5 1. This Action is for: Patent Infringement under Title 35 of the United States Code; Unfair
6 Competition, False Designation of Origin and False Advertising under Title 15 of the United States
7 Code (hereinafter the “Lanham Act”; and Fraud and Unfair Competition under the laws of the State of
8 California.

9 2. This Court has original jurisdiction over this Action under 28 U.S.C. §§ 1331 and/or
10 1338(a) and supplemental subject matter jurisdiction pursuant to 28. U.S.C. § 1367(a).

11 3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1400(b) since it is
12 the Judicial District in which Acquire is doing business and/or in which the claims hereinafter set forth
13 arose.

14 **THE PARTIES**

15 4. Plaintiff is a corporation organized and existing under the laws of the state of Delaware,
16 having its principal place of business located at One Capital City Plaza, 3350 Peachtree Road N.E.,
17 Atlanta, Georgia 30326, and conducting business throughout this District and the State of California.

18 5. Defendant Acquire is a corporation organized and existing under the laws of the State of
19 California, having its principal place of business at 51 University Avenue, Suite G, Los Gatos,
20 California 95030 and conducting business throughout this District and the State of California.

21 **PATENTS IN SUIT**

22 6. Convex is the owner of the entire right, title and interest in and to an exclusive license
23 under said United States Patent Nos. 6,070,752, 6196,411, 6,464,072, 6,481,573, 6,604,629 and
24 6,647,696, including the right to sue and recover for past, present and future infringements of each.

25 7. On June 6, 2000, United States Patent No. 6,070,752 (the “752 Patent”), entitled
26 “Combined Merchandise Container And Display Device” was duly and legally issued by the United
27 States Patent and Trademark Office to East End, Inc., naming as co-inventors Messrs. John Nava, John
28 Lyons and Donald Farsworth.

1 8. On March 6, 2001, United States Patent No. 6,196,411 (the “411 Patent”), entitled
2 “Combined Merchandise Container And Display Device” was duly and legally issued by the United
3 States Patent and Trademark Office to East End, Inc., naming as co-inventors Messrs. John Nava, John
4 Lyons and Donald Farsworth.

5 9. On October 15, 2002, United States Patent No. 6,464,072 (the “072 Patent”), entitled
6 “Packaging Device For Disc-Shaped Items And Related Materials And Method For Packaging Such
7 Disks And Material” was duly and legally issued by the United States Patent and Trademark Office to
8 co-inventors Alexandra Gordon and Charles Grimes.

9 10. On November 19, 2002, United States Patent No. 6,481,573 (the “573 Patent”), entitled
10 “Packaging Device For Disc-Shaped Items And Related Materials And Method For Packaging Such
11 Disks And Material” was duly and legally issued by the United States Patent and Trademark Office to
12 co-inventors Alexandra Gordon and Charles Grimes.

13 11. On August 12, 2003, United States Patent No. 6,604,629 (the “629 Patent”), entitled
14 “Plug Packaging Device For Disc-Shaped Items And Related Materials And Method For Packaging
15 Such Disks And Material” was duly and legally issued by the United States Patent and Trademark
16 Office to co-inventors Alexandra Gordon, Charles Grimes and William L. Plumb.

17 12. On November 18, 2003, United States Patent No. 6,647,696 (the “696 Patent”), entitled
18 “Open Cup Lid Packaging Device For Disc-Shaped Items And Related Materials And Method For
19 Packaging Such Disks And Material” was duly and legally issued by the United States Patent and
20 Trademark Office to Avecmedia, Inc., naming as co-inventors Alexandra Gordon, Charles Grimes and
21 William L. Plumb.

22 13. The owners of title to the aforesaid Lid Patents have consented to and have authorized
23 Plaintiff to commence and pursue the instant patent infringement action.

24 **FIRST CAUSE OF ACTION**

25 **(Infringement of U.S. Patent No. 6,070,752)**

26 14. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding
27 paragraphs numbered 1-13, with the same force and effect as if fully set forth herein.

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1 15. The Defendant, in violation of 35 U.S.C. § 271, has been and is infringing one or more
2 claims of the '752 Patent by making, using, offering to sell or selling, and/or inducing same in this
3 Judicial District and/or elsewhere, products which embody the patented invention, and will continue to
4 do so unless enjoined by this Court.

5 16. The Defendant's infringing activities are without the consent of, authority of, or license
6 from Plaintiff.

7 17. The Defendant's infringement has been and continues to be deliberate, willful and
8 knowing.

9 18. By reason of the acts and practices of the Defendant, the Defendant has caused, is
10 causing and, unless such acts and practices are enjoined, will continue to cause, immediate and
11 irreparable harm to the Plaintiff for which the Plaintiff is entitled to injunctive relief under 35 U.S.C.
12 § 283.

13 19. As a direct and proximate consequence of the acts and practices of the Defendant,
14 Plaintiff has also been, is being, and unless such acts and practices are enjoined, will continue to be
15 injured in its business and property rights, and has suffered, is suffering, and will continue to suffer
16 injury and damages for which Plaintiff is entitled to relief under 35 U.S.C. § 284.

17 **SECOND CAUSE OF ACTION**

18 **(Infringement of U.S. Patent No. 6,196,411)**

19 20. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding
20 paragraphs numbered 1-19, with the same force and effect as if fully set forth herein.

21 21. The Defendant, in violation of 35 U.S.C. § 271, has been, and is infringing one or more
22 claims of the '411 Patent by making, using, offering to sell or selling, and/or inducing same in this
23 Judicial District and/or elsewhere, products which embody the patented invention, and will continue to
24 do so unless enjoined by this Court.

25 22. The Defendant's infringing activities are without the consent of, authority of, or license
26 from Plaintiff.

27 23. The Defendant's infringement has been and continues to be deliberate, willful and
28 knowing.

1 24. By reason of the acts and practices of the Defendant, the Defendant has caused, is
2 causing and, unless such acts and practices are enjoined, will continue to cause, immediate and
3 irreparable harm to the Plaintiff for which the Plaintiff is entitled to injunctive relief under 35 U.S.C.
4 § 283.

5 25. As a direct and proximate consequence of the acts and practices of the Defendant,
6 Plaintiff has also been, is being, and unless such acts and practices are enjoined, will continue to be
7 injured in its business and property rights, and has suffered, is suffering, and will continue to suffer
8 injury and damages for which Plaintiff is entitled to relief under 35 U.S.C. § 284.

9 **THIRD CAUSE OF ACTION**

10 **(Infringement of U.S. Patent No. 6,464,072)**

11 26. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding
12 paragraphs numbered 1-25, with the same force and effect as if fully set forth herein.

13 27. The Defendant, in violation of 35 U.S.C. § 271, has been, and is infringing one or more
14 claims of the '072 Patent by making, using, offering to sell or selling, and/or inducing same in this
15 Judicial District and/or elsewhere, products which embody the patented invention, and will continue to
16 do so unless enjoined by this Court.

17 28. The Defendant's infringing activities are without the consent of, authority of, or license
18 from Plaintiff.

19 29. The Defendant's infringement has been and continues to be deliberate, willful and
20 knowing.

21 30. By reason of the acts and practices of the Defendant, the Defendant has caused, is
22 causing and, unless such acts and practices are enjoined, will continue to cause, immediate and
23 irreparable harm to the Plaintiff for which the Plaintiff is entitled to injunctive relief under 35 U.S.C.
24 § 283.

25 31. As a direct and proximate consequence of the acts and practices of the Defendant,
26 Plaintiff has also been, is being, and unless such acts and practices are enjoined, will continue to be
27 injured in its business and property rights, and has suffered, is suffering, and will continue to suffer
28 injury and damages for which Plaintiff is entitled to relief under 35 U.S.C. § 284.

FOURTH CAUSE OF ACTION

(Infringement of U.S. Patent No. 6,481,573)

32. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding paragraphs numbered 1-31, with the same force and effect as if fully set forth herein.

33. The Defendant, in violation of 35 U.S.C. § 271, has been, and is infringing one or more claims of the '573 Patent by making, using, offering to sell or selling, and/or inducing same in this Judicial District and/or elsewhere, products which embody the patented invention, and will continue to do so unless enjoined by this Court.

34. The Defendant's infringing activities are without the consent of, authority of, or license from Plaintiff.

35. The Defendant's infringement has been and continues to be deliberate, willful and knowing.

36. By reason of the acts and practices of the Defendant, the Defendant has caused, is causing and, unless such acts and practices are enjoined, will continue to cause, immediate and irreparable harm to the Plaintiff for which the Plaintiff is entitled to injunctive relief under 35 U.S.C. § 283.

37. As a direct and proximate consequence of the acts and practices of the Defendant, Plaintiff has also been, is being, and unless such acts and practices are enjoined, will continue to be injured in its business and property rights, and has suffered, is suffering, and will continue to suffer injury and damages for which Plaintiff is entitled to relief under 35 U.S.C. § 284.

FIFTH CAUSE OF ACTION

(Infringement of U.S. Patent No. 6,604,629)

38. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding paragraphs numbered 1-37, with the same force and effect as if fully set forth herein.

39. The Defendant, in violation of 35 U.S.C. § 271, has been, and is infringing one or more claims of the '629 Patent by making, using, offering to sell or selling, and/or inducing same in this Judicial District and/or elsewhere, products which embody the patented invention, and will continue to do so unless enjoined by this Court.

1 40. The Defendant's infringing activities are without the consent of, authority of, or license
2 from Plaintiff.

3 41. The Defendant's infringement has been and continues to be deliberate, willful and
4 knowing.

5 42. By reason of the acts and practices of the Defendant, the Defendant has caused, is
6 causing and, unless such acts and practices are enjoined, will continue to cause, immediate and
7 irreparable harm to the Plaintiff for which the Plaintiff is entitled to injunctive relief under 35 U.S.C.
8 § 283.

9 43. As a direct and proximate consequence of the acts and practices of the Defendant,
10 Plaintiff has also been, is being, and unless such acts and practices are enjoined, will continue to be
11 injured in its business and property rights, and has suffered, is suffering, and will continue to suffer
12 injury and damages for which Plaintiff is entitled to relief under 35 U.S.C. § 284.

13 **SIXTH CAUSE OF ACTION**

14 **(Infringement of U.S. Patent No. 6,647,696)**

15 44. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding
16 paragraphs numbered 1-42 with the same force and effect as if fully set forth herein.

17 45. The Defendant, in violation of 35 U.S.C. § 271, has been, and is infringing one or more
18 claims of the '696 Patent by making, using, offering to sell or selling, and/or inducing same in this
19 Judicial District and/or elsewhere, products which embody the patented invention, and will continue to
20 do so unless enjoined by this Court.

21 46. The Defendant's infringing activities are without the consent of, authority of, or license
22 from Plaintiff.

23 47. The Defendant's infringement has been and continues to be deliberate, willful and
24 knowing.

25 48. By reason of the acts and practices of the Defendant, the Defendant has caused, is
26 causing and, unless such acts and practices are enjoined, will continue to cause, immediate and
27 irreparable harm to the Plaintiff for which the Plaintiff is entitled to injunctive relief under 35 U.S.C.
28 § 283.

1 49. As a direct and proximate consequence of the acts and practices of the Defendant,
2 Plaintiff has also been, is being, and unless such acts and practices are enjoined, will continue to be
3 injured in its business and property rights, and has suffered, is suffering, and will continue to suffer
4 injury and damages for which Plaintiff is entitled to relief under 35 U.S.C. § 284.

5 **SEVENTH CAUSE OF ACTION**

6 **(Federal Unfair Competition And False Advertising)**

7 50. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding
8 paragraphs numbered 1-49 with the same force and effect as if fully set forth herein.

9 51. The Defendant, in violation of Section 43(a) of the Lanham Trademark Act, 15 U.S.C.
10 § 1125(a), and without consent or permission from the Plaintiff, has been, and is engaging in, false
11 advertising through the manufacture, distribution, offer for sale and/or sale in the United States of
12 “knock-offs” of Plaintiff’s patented devices, thereby misleading consumers into believing that the
13 Defendant’s devices are actually Plaintiff’s. Upon information and belief, Defendant has engaged in
14 marketing and advertising of its infringing product by displaying and unlawfully using photographs of
15 Plaintiff’s patented product to generate sales of the infringing product, in a manner akin to the old “bait
16 and switch” routine which has been used over the years by parties seeking to mislead or defraud others.

17 52. Defendant’s marketing, advertising, labeling and statements are false and misleading in
18 substantially all material respects, done intentionally, wrongfully and without justification or privilege,
19 resulting in immediate and irreparable harm to the Plaintiff.

20 53. The Defendant’s willful and deliberate acts are likely to confuse and mislead the public
21 and to thereby cause grave and irreparable harm to Plaintiff’s business.

22 54. Plaintiff has suffered, is suffering and will continue to suffer irreparable harm and
23 damage as a result of the Defendant’s aforesaid activities. The Defendant will, unless restrained and
24 enjoined, continue to act in the unlawful manner complained of herein, all to Plaintiff’s irreparable
25 damage. Plaintiff’s remedy at law is not adequate to compensate it for the injuries suffered and
26 threatened.

27 55. By reason of the Defendant’s acts complained of herein, Plaintiff has also suffered
28 monetary damages in a total amount to be determined at trial.

1 **EIGHTH CAUSE OF ACTION**

2 **(Federal Unfair Competition And False Designation Of Origin)**

3 56. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding
4 paragraphs numbered 1-55, with the same force and effect as if fully set forth herein.

5 57. The Defendant, in violation of Section 43(a) of the Lanham Trademark Act, 15 U.S.C.
6 § 1125(a), has been and is: (a) selling infringing devices bearing the trademark "SI," a mark not owned
7 by Defendant but rather by a separate and distinct party that is unaffiliated with the Defendant, and
8 which has not given to the Defendant permission or authorization to use same, and (b) offering for sale
9 products which embody the inventions of the Lid Patents and which bear one or more of the U.S. Patent
10 Numbers of Lid Patents which are the subject of this lawsuit, exclusive rights to which are owned by
11 and are the property of the Plaintiff.

12 58. By misappropriating and using the aforesaid trademark and one or more of the U.S.
13 Patent Numbers of Lid Patents which are the subject of this lawsuit, Defendant has engaged, does
14 engage and in the future will engage in conduct which grossly and egregiously misrepresents and falsely
15 describes to purchasers and to the general public the origin and source of infringing products and creates
16 a likelihood of confusion on the part of the public and by ultimate purchasers as to the source and
17 sponsorship of such merchandise.

18 59. Defendant's unlawful, unauthorized and unlicensed manufacture, distribution, offer for
19 sale and/or sale of infringing products creates express and implied misrepresentations that its infringing
20 products were created, authorized or approved by Plaintiff, all to Defendant's profit and to Plaintiff's
21 great damage and injury.

22 **NINTH CAUSE OF ACTION**

23 **(California Unfair Competition)**

24 60. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding
25 paragraphs numbered 1-59, with the same force and effect as if fully set forth herein.

26 61. The Defendant's acts as alleged above, constitute unfair business practices in violation of
27 the California Business and Professions Code § 17200.

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1 62. By engaging in the unlawful conduct, acts and practices alleged herein, the Defendant
2 has committed one or more acts of unfair competition within the meaning of § 17200 of the California
3 Business and Professions Code.

4 63. As alleged herein, the Defendant has been unjustly enriched as a result of its wrongful
5 conduct and unfair competition. Consequently, the Defendant should be required to make restitution to
6 Plaintiff and/or to disgorge its ill-gotten gains.

7 64. As a result of the Defendant's continuing acts of Unfair Competition and Unfair Business
8 Practices, Plaintiff has suffered and will continue to suffer severe and irreparable harm. Plaintiff has no
9 adequate remedy at law and is thus entitled to injunctive relief.

10 **TENTH CAUSE OF ACTION**

11 **(Fraud Under Cal. Code Civ. Proc. § 338)**

12 65. Plaintiff repeats and reaffirms each and all of the allegations contained in the preceding
13 paragraphs numbered 1-64, with the same force and effect as if fully set forth herein.

14 66. The Defendant's acts as alleged above, constitute fraud and deceit in violation of the
15 California Code of Civil Procedure § 338.

16 67. As a result of the Defendant's continuing acts of fraud, Plaintiff has suffered and will
17 continue to suffer severe and irreparable harm. Plaintiff has no adequate remedy at law and is thus
18 entitled to injunctive relief.

19 **PRAAYER FOR RELIEF**

20 WHEREFORE, Plaintiff respectfully requests this Court to grant to it an Order and Judgment
21 which includes the following relief as to each of the above causes of action:

22 A. Plaintiff is the owner of the entire right, title and interest in and to an exclusive license to
23 and under the Lid Patents, including the right to sue and recover for past, present and continuing
24 infringement thereof;

25 B. Each of the Lid Patents was duly and legally issued, is valid and enforceable, and is
26 infringed by the Defendant;

27 C. The Defendant and those acting in concert with it be permanently enjoined from
28 engaging in further acts of infringement of said Lid Patents pursuant to 35 U.S.C. § 283;

1 D. The Defendant and those acting in concert with it be required to account to Plaintiff for
2 any and all profits thus derived by them, and be ordered to compensate the Plaintiff for all damages
3 sustained by Plaintiff by reason of the acts of patent infringement set forth herein, and that the damages
4 herein be trebled;

5 E. The Defendant be ordered to pay over to Plaintiff all of its respective gains, profits and
6 advantages derived from sales obtained by infringement together with compensation for all damages
7 sustained by Plaintiff as a result of the Defendant's wrongful acts of infringement and, in view of the
8 willful and deliberate nature of their acts, that such amount be trebled;

9 F. The Defendant be ordered to pay the costs of this action and to pay to Plaintiff the
10 reasonable attorneys' fees expended by Plaintiff in this action for infringement, together with all of its
11 other costs and disbursements herein;

12 G. Plaintiff be awarded damages adequate to compensate for the Defendant's infringement
13 of said Lid Patents together with prejudgment interest, said damages to be trebled pursuant to 35 U.S.C.
14 § 284;

15 H. Plaintiff be awarded its reasonable attorneys' fees pursuant to 35 U.S.C. § 285;

16 I. The Defendant be preliminarily and permanently enjoined by this Court from making
17 false descriptions and/or representations relating to the marketing, advertising, origin or nature of its
18 product line;

19 J. The Defendant be preliminarily and permanently enjoined by this Court from
20 manufacturing, advertising, offering for sale, selling and/or distributing its product line bearing any
21 United States Patent Numbers or marks which would identify the product with the Plaintiff or with any
22 other party which has not authorized same in advance;

23 K. The Defendant be ordered to account to this Court and to Plaintiff for damages and the
24 Defendant's profits arising from the Defendant's unfair competition, false advertising, false designation
25 of origin and fraud;

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1 L. Judgment including punitive damages arising out of Plaintiff's state law claims due to the
2 Defendant's intentional unlawful acts in violation of the rights of Plaintiff, and Defendant's fraud, unfair
3 competition, false advertising, and false designation of origin;

4 M. That the aforesaid award to Plaintiff be in a total amount no less than One Hundred
5 Million Dollars; and

6 N. Such other relief that this Court deems to be just and equitable.
7

8 DATED: September 29, 2004

PAUL J. SUTTON
TERENCE J. CLARK
ANDREW ELISEEV
GREENBERG TRAURIG, LLP

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12 By _____ /S/
Paul J. Sutton

13
14 Attorneys for Plaintiff Convex Promotions, Inc.

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25 Attorneys for Plaintiff
26 Convex Promotions, Inc.
27
28

CERTIFICATION AS TO INTERESTED PARTIES

Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding:

1. Convex Promotions, Inc. (plaintiff);
2. Acquire, Inc. (defendant); and
3. Jeff Arnold (owner of Convex).

DATED: September 29, 2004

PAUL J. SUTTON
TERENCE J. CLARK
ANDREW ELISEEV
GREENBERG TRAURIG, LLP

By _____ /S/
Paul J. Sutton

Attorneys for Plaintiff Convex Promotions, Inc.

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Attorneys for Plaintiff
Convex Promotions, Inc.

JURY DEMAND

Pursuant to Rule 38(b), Fed. R. Civ. P., Plaintiff hereby demands a trial by jury of all issues which may be tried before a jury as a matter of right.

DATED: September 29, 2004

PAUL J. SUTTON
TERENCE J. CLARK
ANDREW ELISEEV
GREENBERG TRAURIG, LLP

By _____ /S/
Paul J. Sutton

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