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September 11, 2023

The Honorable Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street, S.W., Room 112
Washington, DC 20436

Lisa M. Kattan
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Re: *Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same*, ITC Inv. No. 337-TA-1265 (Enforcement Proceeding)

Dear Secretary Barton:

Enclosed for filing on behalf of Complainants DISH DBS Corporation, DISH Technologies L.L.C., and Sling TV L.L.C. (collectively, "DISH") are documents in support of DISH's request that the U.S. International Trade Commission commence an investigation pursuant to Section 337 of the Tariff Act of 1930, as amended. This submission includes:

1. One (1) electronic copy of DISH's non-confidential Enforcement Complaint;

2. One (1) electronic copy of the non-confidential exhibits to the Complaint;

3. One (1) electronic copy of the confidential exhibits to the Complaint; and

4. A letter and certification requesting confidential treatment for the information contained in Confidential Exhibits F, X, BB, CC and DD thereto, pursuant to Commission Rules 201.6(b) and 210.5(d).

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions regarding this submission.

Respectfully submitted,

/s/ Lisa M. Kattan

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Re: *Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same*, ITC Inv. No. 337-TA-1265 (Enforcement Proceeding)

Dear Secretary Barton:

Complainants DISH DBS Corporation, DISH Technologies L.L.C., and Sling TV L.L.C. (collectively, "DISH") requests, pursuant to 19 C.F.R. § 201.6, confidential treatment of the confidential business information contained in confidential Exhibits F, X, BB, CC and DD to DISH's Complaint transmitted herewith. Confidential business information is identified by red brackets.

The information for which confidential treatment is sought is proprietary commercial and technical information not otherwise publicly available. Specifically, the enforcement complaint and exhibits contain the following:

Confidential Exhibit F: The Patent License Agreement between DISH Technologies L.L.C and Sling TV L.L.C. contains the rights and reservations to license a list of enumerated patents and patent applications, the terms and conditions of which "shall be kept strictly confidential" as agreed upon by both parties and therefore redacted in full.

Confidential Exhibit X: DISH's Response to iFIT's Ruling Request contains information regarding the functionalities of iFIT's confidential source code for covered domestic industry products and services, including source code redesigns for such products and services.

Confidential Exhibit BB: The Declaration of Stuart Kroonenberg contains information regarding DISH's confidential business and financial information, including activities related to DISH's domestic industry expenditures.

Confidential Exhibit CC: The Declaration of Greg Harding contains information regarding DISH's proprietary methodologies and processes for providing covered domestic industry products and services, as well as other proprietary and confidential information not available to the public.

Confidential Exhibit DD: This invoice contains personal email and address information of a buyer of iFIT equipment.

The information described above qualifies as confidential information pursuant to 19 C.F.R. § 201.6 because:

1. it is not available to the public;

2. unauthorized disclosure of such information could cause substantial harm the competitive position of DISH or iFIT; and

3. its disclosure could impair the Commission's ability to obtain information necessary to perform its statutory function.

Please contact me should you have any questions concerning this submission.

Respectfully submitted,

/s/ Lisa M. Kattan

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Attorney for Complainants DISH DBS Corporation, DISH Technologies L.L.C., and Sling TV L.L.C.

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

In the matter of **CERTAIN FITNESS DEVICES, STREAMING COMPONENTS THEREOF, AND SYSTEMS CONTAINING SAME**	**Investigation No. 337-TA-1265** **(Enforcement Proceeding)**

ENFORCEMENT COMPLAINT OF DISH DBS CORPORATION *ET AL.*

Enforcement Complainants:

DISH DBS Corporation
9601 South Meridian Boulevard
Englewood, Colorado 80112
Phone: 303-723-1000

DISH Technologies L.L.C.
9601 South Meridian Boulevard
Englewood, Colorado 80112
Phone: 303-723-1000

Sling TV L.L.C.
9601 South Meridian Boulevard
Englewood, Colorado 80112
Phone: 303-723-1000

Enforcement Respondents:

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1500 S 1000 W
Logan, UT 84321
Phone: (435) 750-5000

FreeMotion Fitness, Inc.
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Phone: (435) 750-5000

NordicTrack, Inc.
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Phone: (435) 750-5000

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C	U.S. Customs and Border Protection Ruling Letter
D	’554 Patent Claim Chart
E	’555 Patent Claim Chart
F	CONFIDENTIAL Patent License Agreement between DISH Technologies L.L.C and Sling TV L.L.C
G	iFIT Post-Oral Discussion Brief ISO Ruling Request
H	Email from J. Braithwaite to Lisa Kattan
I	Import Data
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K	Website Information – iFIT – https://www.ifit.com/equipment
L	Website Information – Freemotion Fitness – https://freemotionfitness.com/machine-for-home-gym/r22-9-recumbent-bike/
M	Website Information – NordicTrack – https://www.nordictrack.com/exercise-bikes/s22i-studio-bike
N	Website Information – ProForm – https://www.proform.com/exercise-bikes/studio-bike-pro
O	Website Information – Wayback Machine – iFIT – https://web.archive.org/web/20230315200722/https://www.ifit.com/equipment
P	Website Information – Wayback Machine – NordicTrack – https://web.archive.org/web/20230314200812/https://www.nordictrack.com/exercise-bikes/s22i-studio-bike
Q	Website Information – Wayback Machine – ProForm – https://web.archive.org/web/20230318210806/https://www.proform.com/exercise-bikes/studio-bike-pro
R	Website Information – Wayback Machine – iFIT – https://web.archive.org/web/20230401052019/https://www.ifit.com/equipment
S	Website Information – Wayback Machine – NordicTrack – https://web.archive.org/web/20230330113044/https://www.nordictrack.com/exercise-bikes/s22i-studio-bike
T	Website Information – Wayback Machine – ProForm – https://web.archive.org/web/20230411155158/https://www.proform.com/exercise-bikes/studio-bike-pro
U	Website Information – Wayback Machine – iFIT – https://web.archive.org/web/20230512022840/https://www.ifit.com/equipment
V	Website Information – Wayback Machine – NordicTrack – https://web.archive.org/web/20230516150034/https://www.nordictrack.com/exercise-bikes/s22i-studio-bike

Exhibit	Document Description
W	Website Information – Wayback Machine – ProForm – https://web.archive.org/web/20230529030610/https://www.proform.com/exercise-bikes/studio-bike-pro
X	DISH Response to iFIT Ruling Request
Y	Website Information – Amazon – NordicTrack – https://www.amazon.com/NordicTrack-Commercial-S22i-Studio-Cycle/dp/B08KBWQ9FJ/
Z	Website Information – Amazon – ProForm – https://www.amazon.com/ProForm-Studio-Touchscreen-30-Day-Membership/dp/B0935BJ6QG/
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CC	CONFIDENTIAL Declaration of Greg Harding
DD	Invoice

I. INTRODUCTION

1.1. DISH DBS Corporation ("DDBS"), DISH Technologies L.L.C. ("DTL"), and Sling TV L.L.C. ("STL") (collectively, "DISH"), bring this Enforcement Complaint because iFIT Inc.;[1] FreeMotion Fitness, Inc.; and NordicTrack, Inc. (collectively, "iFIT") are violating the remedial orders of the International Trade Commission ("Commission"). The Commission entered those remedial orders in *Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same*, Inv. No. 337-TA-1265 ("1265 Investigation") as a result of iFIT's infringement of DISH's patents in violation of section 337. Despite being ordered to cease and desist doing so, iFIT continues to import, sell, offer for sale, market, advertise, distribute, transfer, and solicit United States agents or distributors in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of the exact same products adjudicated to infringe DISH's patents in the underlying investigation, as well as newly released products with redesigned software that also infringes DISH's patents.

1.2. The limited exclusion order ("LEO") and cease-and-desist orders ("CDOs") that iFIT is violating issued on March 8, 2023, following a full evidentiary hearing and Commission review. *See* Comm'n Op. (Mar. 8, 2023) (EDIS Doc ID 792088); FED. REG. 15736 (Mar. 14, 2023). Those orders expressly prohibit iFIT from importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of certain fitness devices, streaming components thereof that infringe one or more of claims 16, 17, and 20 of U.S. Patent No. 10,469,554 ("'554 Patent"); claims 10,

[1] iFIT Inc. was named "ICON Health & Fitness, Inc." when DISH originally filed its complaint but formally changed its name to "iFIT Inc." during the underlying investigation. *See* 86 FED. REG. 70532 (Dec. 10, 2021).

11, 14, and 15 of U.S. Patent No. 10,469,555 ("'555 Patent"); and claims 1, 2, and 4 of U.S. Patent No. 10,757,156 ("'156 Patent")[2] in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337). *See* LEO (Mar. 8, 2023) (EDIS Doc ID 792086); CDO to FreeMotion Fitness, Inc. (Mar. 8, 2023) (EDIS Doc ID 792090); CDO to iFIT Inc. (Mar. 8, 2023) (EDIS Doc ID 792092); CDO to NordicTrack, Inc. (Mar. 8, 2023) (EDIS Doc ID 792084).

1.3. Despite iFIT's representation to the Commission that a 120-day enforcement delay would be "necessary" to develop and implement a redesign, iFIT submitted three different redesigns for consideration to U.S. Customs and Border Protection ("CBP") in a 19 C.F.R. § 177 ("Part 177") proceeding on March 24, 2023—only 16 days after the Final Determination and 45 days ***before*** the requested delay would have even begun. *See* Respondents' Response to the Commission's November 18, 2022 Request for Written Submissions on the Issues under Review and on Remedy, the Public Interest, and Bonding at 34 (Dec. 2, 2022) (EDIS Doc ID 785571); **Exhibit A** (iFIT Ruling Request). And rather than introducing its purported design-arounds during the underlying investigation or seeking an advisory opinion from the Commission—both of which would have allowed full evidentiary record to be developed before the Commission—iFIT introduced its redesigns for the first time to CBP. iFIT's decision to immediately seek a non-infringement ruling using CBP's Part 177 proceeding while it continued to import, advertise, and sell products that infringe DISH's patents reflects a continuum of bad faith where iFIT has repeatedly placed the importance of getting its products back into the U.S. market as quickly as possible over the importance of avoiding violation of the Commission's orders.

[2] DISH is not relying on the '156 Patent in this proceeding solely to preserve the parties' and the Commission's resources.

1.4. Since March 8, 2023 (the date the Commission issued its remedial orders), iFIT has consistently failed to "stay several healthy steps" away from violating the Commission's remedial orders. *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. No. 337-TA-372, USITC Pub. No. 3073, Comm'n Op. at 23-24 (Nov. 1997) (1997 WL 857227, at *10). To the contrary, iFIT hardly changed its business practices at all, and continued to import, advertise, and sell infringing products. iFIT has been scrambling to keep its products on the market since March 8, 2023, to the point that it filed a CBP Rule 177 request before it had a sufficiently fixed redesign for CBP and DISH to consider. In fact, iFIT failed to provide the source code for one of its three designs until the middle of the CBP proceeding, ***after*** DISH had completed its source code analysis, such that DISH was unable to fully consider it, and CBP declined to rule on it. *See* **Exhibit C** (CBP Ruling Letter) at 19. This further reflects iFIT's elevation of speed over caution.

1.5. iFIT has now violated the Commission's remedial orders in at least two ways.[3] First, rather than update its products with its redesigned software ***before*** they are imported into the United States, iFIT chose a faster and easier solution. iFIT imports its fitness devices with infringing, legacy software (collectively, "Legacy Products"),[4] sells and distributes them, and then pushes an update to customers only after the imported fitness devices have been purchased and set up in a customer's home. Second, although CBP found that the two redesigns iFIT produced during its Part 177 proceeding are outside of the scope of the LEO, CBP's decision improperly narrowed claims 16, 17, and 20 of the '554 Patent and claims 10, 11, 14, and 15 of the '555 Patent

[3] DISH anticipates that discovery may identify further violations of the Commission's LEO and/or CDOs, and it will pursue adjudication of those violations as it identifies them after institution of an enforcement action.

[4] DISH understands this to include fitness devices with software of any version lower than 2.6.85.4257. *See* **Exhibit A** (iFIT Ruling Request) at 1.

(collectively, "Asserted Claims"). Under a proper reading of those claims, the Redesigned Products also infringe the '554 Patent and the '555 Patent (collectively, "Asserted Patents").

1.6. DISH's industry-leading technological advancements in the field of content delivery depend on the continued protection and exploitation of its intellectual property rights. iFIT's bad faith disregard of these rights, and the Commission's orders, warrants the maximum relief afforded under the law. Such relief includes, but should not be limited to, the imposition of the maximum civil penalties for each day on which a violation of the CDOs occurred in the amount of $100,000 or twice the domestic value of the articles, whichever is greater. 19 U.S.C. § 1337(f); 19 C.F.R. § 210.75.

II. JURISDICTION

2.1. The Commission has jurisdiction over this matter and the proposed parties pursuant to §§ 333 and 337 of the Tariff Act of 1930, as amended, and 19 C.F.R. § 210.75.

III. ENFORCEMENT COMPLAINANTS

1.1. Since launching their first satellites in 1995, DISH and its affiliated companies have continued to invest millions of dollars in research and development and the acquisition of novel technologies that resolve long felt problems and needs across its industry. Confidential Exhibits to the Public Complaint in Inv. No. 337-TA-1265 (Apr. 13, 2021) (EDIS Doc ID 739721) ("Violation Complaint"), **CONFIDENTIAL Exhibit BB** at ¶ 8. DISH's technologies have won numerous awards over the decades, including: the 2002 CES Best of Show for DISHPVR 721 Set-Top Box; the 2006 CNET, Editor's Choice Award for ViP®622 DVR; the 2008 CNET, Editor's Choice Award for ViP®722 DVR; the 2012 Popular Mechanics Editors' Choice Award for DISH's Hopper® Whole-Home HD DVR; the 2013 CES Best of Show award for the DISH's Hopper™ with Sling® Whole-Home HD DVR; the 2015 Engadget, Best of the Best of CES for

Sling TV; and the 2016 PC Magazine, The Best of CES 2016, Best Home Theater Gear: Hopper 3.

1.2. As the public continues to increasingly rely on the Internet for its informational and entertainment needs, one such problem into which DISH and its affiliated companies have dedicated great time and resources is to improve the quality of streaming media. **CONFIDENTIAL Exhibit CC** at ¶ 46. One of the biggest advancements in this regard was the adaptive bitrate ("ABR") technology claimed in the Asserted Patents. *Id.* at ¶ 47. This technology is employed as part of the streaming services offered by DISH under both the "DISH" and "Sling" brands. *Id.* at ¶¶ 48-52.

(a) <u>DISH DBS Corporation</u>

3.1. DDBS is a corporation organized and existing under the laws of the State of Colorado. Violation Complaint, **CONFIDENTIAL Exhibit BB** at ¶ 5. Its principal place of business is located at 9601 South Meridian Boulevard, Englewood, Colorado 80112. *Id.*

3.2. DDBS is a holding company. Violation Complaint, **CONFIDENTIAL Exhibit BB** at ¶ 11. DDBS and its subsidiaries offer subscription television services under both the "DISH" and "Sling" brands. *Id.*

3.3. Subscribers to the DISH-branded satellite TV service receive access to a wide selection of Internet broadband-based video-on-demand content through their TV (with an Internet-connected set-top box) and their Internet-connected tablets, smartphones, and computers. Violation Complaint, **CONFIDENTIAL Exhibit BB** at ¶ 13. This streaming service is called DISH On Demand. *Id.* Subscribers to the DISH-branded service also have the ability to use the *DISHAnywhere.com* website and the DISH Anywhere mobile application for smartphones, tablets, and streaming media devices to stream authorized content. *Id.*

3.4. Sling TV is an Internet-based streaming service marketed primarily to consumers who do not subscribe to traditional satellite and cable services. Violation Complaint, **CONFIDENTIAL Exhibit BB** at ¶ 14. Domestic Sling TV services include a single-stream service branded Sling Orange and a multi-stream service branded Sling Blue, which, among other things, provides the ability to stream on up to three devices simultaneously. *Id.* Domestic Sling TV services also include Sling International and Sling Latino, as well as add-on extras, pay-per-view events, and a cloud-based DVR service. *Id.* These services require an Internet connection and are available on multiple streaming-capable devices including streaming media devices, TVs, tablets, computers, game consoles, and smart phones. *Id.*

3.5. DDBS subsidiaries, including DISH Technologies L.L.C. and Sling TV L.L.C. discussed below, operate the servers and other infrastructure required to support and distribute the Internet-based video-on-demand ("IPVOD") and Internet-based live linear streaming content offered to DISH TV and Sling TV subscribers. Violation Complaint, **CONFIDENTIAL Exhibit CC** at ¶ 10.

(b) <u>DISH Technologies L.L.C.</u>

3.6. DTL is a limited liability company organized and existing under the laws of the State of Colorado. Violation Complaint, **CONFIDENTIAL Exhibit BB** at ¶ 16. DTL's principal place of business is the same as that of DDBS: 9601 South Meridian Boulevard, Englewood, Colorado 80112. *Id.*

3.7. DTL is an indirect wholly owned subsidiary of DDBS. Violation Complaint, **CONFIDENTIAL Exhibit CC** at ¶ 17.

3.8. DTL is the owner by assignment of all right, title, and interest in and to the Asserted Patents. Certified copies of the assignment records for each patent were attached as Exhibits 36 and 37 to the Complaint DISH filed during the violation phase of Investigation No. 337-TA-1265.

(c) <u>Sling TV L.L.C.</u>

3.9. STL is a limited liability company organized and existing under the laws of the State of Colorado. Violation Complaint, **CONFIDENTIAL Exhibit BB** at ¶ 21. Its principal place of business is located at 9601 South Meridian Boulevard, Englewood, Colorado 80112. *Id.*

3.10. STL is an indirect wholly owned subsidiary of DDBS. Violation Complaint, **CONFIDENTIAL Exhibit BB** at ¶ 22.

3.11. STL has an exclusive license to the Asserted Patents, including the right to sue thereon. Violation Complaint, **CONFIDENTIAL Exhibit F**.

3.12. STL's primary business is to support and distribute streaming content for the Sling TV brand subscription television service. Violation Complaint, **CONFIDENTIAL Exhibit BB** at ¶ 26.

IV. ENFORCEMENT RESPONDENTS

4.1. iFIT sells and offers for sale in the United States stationary bikes, treadmills, elliptical trainers, strength trainers and rowing machines (collectively, "Fitness Devices") under the FreeMotion, ProForm, and NordicTrack brands. *See* iFIT's Response to Complaint in Inv. No. 337-TA-1265 at ¶ 3.23 (Jun. 18, 2021) (EDIS Doc ID 745068) ("Violation Answer"). iFIT advertises, markets, distributes, offers for sale, and sells these Fitness Devices in the United States doing business as ProForm Fitness Products, and through Free Motion Fitness, Inc. and NordicTrack, Inc. Violation Answer at ¶ 3.24. Upon information and belief, the Fitness Devices with streaming capability that iFIT advertises, markets, distributes, offers for sale, and sells in the United States infringe the Asserted Patents. *See, e.g.*, Final Initial Determination in Inv. No. 337-TA-1265 at 144, 145, 153, 157, 158, 159 (Sept. 9, 2022) (EDIS Doc ID 781840) ("1265 ID"); *see also* 87 FED. REG. 72510 at 511 (Nov. 25, 2022) (Commission determining not to review infringement findings).

(a) <u>iFIT Inc.</u>

4.2. iFIT, Inc. is a Delaware corporation with its principal place of business at 1500 South 1000 West, Logan, Utah 84321. *See* Violation Answer at ¶ 3.25.

4.3. Upon information and belief, iFIT, Inc. advertises, markets, distributes, offers for sale, and sells infringing Fitness Devices as ProForm Fitness Products in the United States using the "ProForm" trademark. *See* Violation Answer at ¶¶ 3.26-3.27.

4.4. Upon information and belief, iFIT, Inc. advertises, markets, distributes, offers for sale, and sells infringing Fitness Devices in the United States through the website www.proform.com. *See* Violation Answer at ¶ 3.28.

4.5. Upon information and belief, iFIT, Inc. advertises, markets, distributes, offers for sale, and sells infringing Fitness Devices in the United States through the website www.freemotion.com. *See* Violation Answer at ¶¶ 3.24, 3.32.

(b) <u>FreeMotion Fitness, Inc.</u>

4.6. FreeMotion Fitness, Inc. is a Utah corporation with its principal place of business at 1500 South 1000 West, Logan, Utah, 84321. Violation Answer at ¶ 3.29.

4.7. FreeMotion Fitness, Inc. is a subsidiary of iFIT, Inc. Violation Answer at ¶ 3.30.

4.8. Upon information and belief, FreeMotion Fitness, Inc. advertises, markets, distributes, offers for sale, and sells infringing Fitness Devices in the United States using the "FreeMotion" trademark. Violation Answer at ¶¶ 3.24, 3.31.

(c) <u>NordicTrack, Inc.</u>

4.9. NordicTrack, Inc. is a Utah corporation with its principal place of business at 1500 South 1000 West, Logan, Utah, 84321. Violation Answer at ¶ 3.33.

4.10. NordicTrack, Inc. is a subsidiary of iFIT, Inc. Violation Answer at ¶ 3.34.

4.11. Upon information and belief, NordicTrack, Inc. advertises, markets, distributes, offers for sale, and sells infringing Fitness Equipment in the United States using the "NordicTrack" trademark. *See* Violation Answer at ¶¶ 3.35-3.36.

4.12. Upon information and belief, NordicTrack, Inc. advertises, markets, distributes, offers for sale, and sells infringing Fitness Equipment in the United States through the website www.nordictrack.com. *See* Violation Answer at ¶ 3.36.

V. THE COMMISSION'S ORDERS

5.1. DISH filed its Complaint in the underlying Investigation on April 13, 2021, identifying violations of section 337 of the Tariff Act of 1930, as amended, as a result of iFIT's infringement of five DISH patents.[5] *See* 86 FED. REG. 20409 (Apr. 19, 2021). The Complaint identified the following iFIT Fitness Devices of infringing the Asserted Claims:

Type	Model
Stationary Bikes	FreeMotion r22.9 FreeMotion u22.9 FreeMotion Coachbike NordicTrack Commercial S15i NordicTrack Commercial S22i NordicTrack Commercial VR25 NordicTrack Commercial R35 NordicTrack Commercial VU 19 NordicTrack Commercial VU 29 ProForm Studio Bike Pro ProForm Studio Bike Pro 22
Treadmills	FreeMotion i22.9 Incline Trainer FreeMotion t22.9 Reflex Treadmill NordicTrack X22i NordicTrack X32i

[5] In addition to the Asserted Patents here, DISH asserted U.S. Patent No. 9,407,564 ("'564 Patent"), U.S. Patent No. 10,757,156 ("'156 Patent"), and U.S. Patent No. 10,951,680 ("'680 Patent"). No violation was found as to the '564 Patent due to lack of domestic industry. *See* Commission Opinion in Inv. No. 337-TA-1265 at 57 (Mar. 23, 2023) (EDIS Doc ID 793020) ("1265 Comm'n Op."). DISH withdrew the '680 Patent prior to the evidentiary hearing. *See* Order No. 21 (Mar. 3, 2022) (EDIS Doc ID 764528). And, although iFIT also was found to infringe the '156 Patent, DISH is not asserting it in this enforcement proceeding.

Type	Model
	NordicTrack Commercial 1750 NordicTrack Commercial 2450 NordicTrack Commercial 2950 NordicTrack EXP 7i NordicTrack EXP10i NordicTrack T 6.5 Si ProForm Carbon T7 ProForm Carbon T10 ProForm Pro 2000 ProForm Pro 9000
Elliptical Trainer	FreeMotion e22.9 Elliptical NordicTrack FS10i NordicTrack FS14i NordicTrack Commercial 9.9 NordicTrack Commercial 14.9 NordicTrack SpaceSaver SE9i ProForm Carbon E7 ProForm E14
Strength Trainers	ProForm Carbon HIIT H7 ProForm Pro HIIT H14 NordicTrack Fusion CST NordicTrack Fusion CST Pro
Rowing Machine	NordicTrack RW600 NordicTrack RW700 NordicTrack RW900 ProForm Pro R10
Flat Panel Fitness Device	NordicTrack Vault (Standalone) NordicTrack Vault (Complete) Vue

See DISH's Complaint in Inv. No. 337-TA-1265 at ¶¶ 6.11, 6.15, 6.18, 6.21 (April 13, 2021) (EDIS Doc ID 739751) ("DISH Complaint"). iFIT stipulated that all of these products "use the same common iFIT software to stream video content over the Internet." *See* Joint Stipulation of DISH and iFIT as to Representative Accused Products at ¶ 4 (Oct. 29, 2021) (EDIS Doc ID 755539) ("Stipulation of Representativeness"). Thus, all of these products were accused of infringing all of the Asserted Claims.

5.2. On May 13, 2021, the Commission instituted the Investigation as Inv. No. 337-TA-1265. *See* 86 FED. REG. 27106 (May 13, 2021). Sixteen months later, Chief Administrative Law

Judge Cheney issued his final initial determination confirming iFIT's violation of section 337. *See, e.g.*, 1265 ID at 254. Among other things, the 1265 ID found that the iFIT's Legacy Products infringe claims 16, 17, and 20 of the '554 patent and claims 10, 11, 14, and 15 of the '555 patent and rejected all of iFIT's defenses. *Id*. at 254–56.

5.3. The Commission determined to review the ID's findings in part, but did not determine to review the ID's determination that iFIT infringes the Asserted Claims. *See* 87 Fed. Reg. 72510 at 511 (Nov. 18, 2022) (EDIS Doc ID 785701). On review, the Commission affirmed the CALJ's finding that iFIT violated section 337. *See generally* 1265 Comm'n Op. The Commission issued an LEO and CDOs directed to iFIT's infringing products on March 8, 2023.

5.4. On May 5, 2023, the Commission modified ¶ 1 of the LEO and ¶ IV(C) of the CDOs to replace the phrase "the date of this Order" with the phrase "the date this Order becomes final within the meaning of 19 U.S.C. § 1337(j)(4)." *See* Modification of LEO (May 5, 2023) (EDIS Doc ID 795715); Modification of CDOs (May 5, 2023) (EDIS Doc ID 795716); 88 FED. REG. 30158 (May 10, 2023). These modifications were made to allow consumers who purchased iFIT's infringing products during the Presidential review period ("PRP") to receive parts and devices necessary for service, repair, or replacement. *See* Petition for Reconsideration at 1 (Apr. 7, 2023) (EDIS Doc ID 793974).

5.5. The PRP ended on May 8, 2023, and the Commission's remedial orders have been in effect since then.[6]

(a) <u>Covered Products</u>

5.6. The Commission's LEO and CDOs each define "covered products" as follows:

[6] Pursuant to agreement between DISH and iFIT during the Part 177 proceeding initiated by iFIT, iFIT was permitted to continue importing infringing products for consumption without bond an until May 18, 2023. **Exhibit B** (Email from J. Braithwaite to CBP) at 1.

> [F]itness devices containing Internet-streaming enabled video displays that are capable of using adaptive bit-rate streaming to stream content, Internet-streaming enabled video displays that are capable of using adaptive bit-rate streaming to stream content and that are designed to be incorporated with fitness devices, and components thereof.

LEO at ¶ 2; CDOs at ¶ i.(G). And the "covered products" are subject to the provisions of the LEO and CDOs if they "infringe one or more of claims 16, 17, and 20 of the '554 patent[or] claims 10, 11, 14, and 15 of the '555 patent." LEO at ¶ 2; CDOs at ¶ i.(G).

5.7. The "covered products" include, but are not limited to, iFIT's stationary bikes, treadmills, elliptical machines, strength trainers, rowing machines, and flat panel fitness devices that are capable of using adaptive bit-rate streaming. These Fitness Devices are imported into the United States by iFIT, Inc.

(b) <u>Prohibited Conduct</u>

5.8. The Commission's LEO provides that iFIT's "covered products" that infringe the Asserted Claims are:

> [E]xcluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for the remaining terms of the Asserted Patents, except under license from, or with the permission of, the patent owner or as provided by law; and except for parts necessary to service and repair covered products purchased by consumers prior to the date of this Order, and except for covered products that are replacements for covered products purchased by consumers prior to the date of this Order, provided that replacement is pursuant to a warranty for the replaced article.

LEO at ¶ 1.

5.9. The provisions of the LEO specifically apply to the three iFIT entities and "any of their affiliated companies, parents, subsidiaries, agents, or other related business entities, or its successors or assigns." LEO at ¶ 1.

5.10. The Commission's CDOs provide that the following activities are prohibited "[f]or the remaining terms of the Asserted Patents":

> (A) import[ing] or sell[ing] for importation into the United States covered products;
>
> (B) market[ing], distribut[ing], sell[ing], or otherwise transfer[ing] (except for exportation) in the United States imported covered products;
>
> (C) advertis[ing] imported covered products;
>
> (D) solicit[ing] U.S. agents or distributors for imported covered products; or
>
> (E) aid[ing] or abet[ting] other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products.

See CDOs at § III.

5.11. The provisions of the CDOs specifically apply to each of the three iFIT entities and "any of its principals, stockholders, officers, directors, employees, agents, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns." CDOs at ¶ II.

VI. NON-TECHNICAL DESCRIPTION OF THE PATENTED TECHNOLOGIES OF THE ASSERTED PATENTS[7]

6.1. Over-the-top ("OTT") service emerged as a delivery mechanism for digital content over the Internet in the 1990s and 2000s. *See* **CONFIDENTIAL Exhibit CC** at ¶¶ 13-18. One of the original companies working to address challenges brought on by the emergence of OTT was Move Networks, which was founded by Drew Major, one of the inventors of the Asserted Patents.

[7] The contents of this Complaint, including this section (*i.e.*, "Non-Technical Description of the Patented Technologies of the Asserted Patents"), do not and are not intended to construe either the specification or the claims of the Asserted Patents.

6.2. Move Networks invented HTTP-based Adaptive Bitrate Streaming to improve the quality of streamed video content over the Internet. *See* **CONFIDENTIAL Exhibit CC** at ¶¶ 19-20. To access video content online in the early 2000s, users were left with two mediocre choices: (1) waiting for their content to download, which did not support immediate viewing of live content and often required the user themselves to select the desired quality – *e.g.*, LOW, MEDIUM, or HIGH (which in turn determined how long the user had to wait before viewing); or (2) streaming live or recorded content, which often was unreliable (*e.g.*, it resulted in pausing to "buffer") or only worked at low-resolution. *Id.* at ¶ 18. The inventors therefore observed that "a need exists for an [invention] that alleviate[s] the problems of reliability, efficiency, and latency" encountered in then-available content streaming systems. *See, e.g.*, '554 Patent at 2:58-60.

6.3. The inventors of the Asserted Patents came up with a novel solution: HTTP-based ABR streaming driven by intelligent end-user clients that "pull" content from a server as opposed to servers that "push" content to the clients. One unconventional but fundamental improvement is the segmentation of an original content file into sets of streamlets (*e.g.*, high, medium, and low quality sets), where the streamlets in the sets are aligned by starting time and duration. For example, the content is first segmented into short two-second raw streamlets and then each raw streamlet is encoded at different bitrates, yielding different qualities creating a set of streamlets of different data sizes for each segment.

6.4. The alignment of the streamlets across the sets allows a client device to select streamlets in response to network conditions by simply requesting the most appropriate streamlet at the time. For example, a client with constrained network bandwidth can request low bitrate streamlets to play back video at a lower quality instead of "buffering" or freezing while waiting

for high bitrate streamlets to download. This enables users to watch content at the highest possible bitrate as the media is streamed.

6.5. Another revolutionary improvement is that the system is "pull" based, where the client device controls requests for streamlets. The benefits of using an intelligent pull-based client are two-fold. First, the claimed inventions reduce latency and improve efficiency because the client is in a better position to request streamlets based on actual network and individual buffer conditions. Second, moving the decision-making to the client reduces the need for custom "push" based video servers to assess the connection and manage the state of each individual client streaming session. Thus, a standard web server can be used to host streamlets.

6.6. This, in turn, allows for the use of standard data protocols such as HTTP/TCP for requesting streamlets, which in turn permits massive and relatively inexpensive scaling using standardized web caches, leading to a vast reduction in operating and publishing costs. Thus, the claimed invention provides a reliable and efficient solution that improves the functioning of devices used to stream content data, while reducing overall latency and network congestion.

6.7. Both of the Asserted Patents are titled "Apparatus, System, and Method for Multi-Bitrate Content Streaming" and each of them "relates to video streaming over packet switched networks such as the Internet." '554 Patent at 1:31-32; '555 Patent at 1:31-32. Each of the '554 Patent and'555 Patent includes claims reciting the inventive subject matter from the server side and claims reciting the inventive subject matter on the client side. The infringement allegations herein focus on the claims that recite the inventive subject matter on the client side because that is what is being imported, sold, offered for sale, marketed, advertised, distributed, and transferred by iFIT in the United States in circumvention of the Commission's remedial orders.

6.8. Independent claim 16 of the '554 patent recites the following:

[a] 16. An end user station to stream a live event video over a network from a server for playback of the video, the content player device comprising:

[b] a processor;

[c] a digital processing apparatus memory device comprising non-transitory machine-readable instructions that, when executed, cause the processor to:

[d] establish one or more network connections between the end user station and the server, wherein the server is configured to access at least one of a plurality of groups of streamlets;

[e] wherein the live event video is encoded at a plurality of different bitrates to create a plurality of streams including at least a low quality stream, a medium quality stream, and a high quality stream, each of the low quality stream, the medium quality stream, and the high quality stream comprising a group of streamlets encoded at the same respective one of the different bitrates, each group comprising at least first and second streamlets, each of the streamlets corresponding to a portion of the live event video;

[f] wherein at least one of the low quality stream, the medium quality stream, and the high quality stream is encoded at a bit rate of no less than 600 kbps; and

[g] wherein the first streamlets of each of the low quality stream, the medium quality stream and the high quality stream each has an equal playback duration and each of the first streamlets encodes the same portion of the live event video at a different one of the different bitrates;

[h] select a specific one of the low quality stream, the medium quality stream, and the high quality stream based upon a determination by the end user station to select a higher or lower bitrate version of the streams;

[i] place a streamlet request to the server over the one or more network connections for the first streamlet of the selected stream;

[j] receive the requested first streamlet from the server via the one or more network connections; and

[k] provide the received first streamlet for playback of the live event video.

See ’554 Patent at 20:3-47.

6.9. Independent claim 10 of the ’555 patent recites:

> [a] 10. A content player device to stream a video over a network from a server for playback of the video, the content player device comprising:
>
> [b] a processor;
>
> [c] a digital processing apparatus memory device comprising non-transitory machine-readable instructions that, when executed, cause the processor to:
>
> [d] establish one or more network connections between the client module and the server, wherein the server is configured to access at least one of a plurality of groups of streamlets;
>
> [e] wherein the video is encoded at a plurality of different bitrates to create a plurality of streams including at least a low quality stream, a medium quality stream, and a high quality stream, wherein each of the low quality stream, the medium quality stream, and the high quality stream comprises a streamlet that encodes the same portion of the video at a different one of the plurality of different bitrates;
>
> [f] wherein at least one of the low quality stream, medium quality stream, and high quality stream is encoded at a bit rate of no less than 600 kbps; and
>
> [g] wherein the streamlet encoding the same portion of the video in the low quality stream has an equal playback duration as the streamlet encoding the same portion of the video in the high quality stream;
>
> [h] select a specific one of the streams based upon a determination by the client module to select a higher or lower bitrate version of the streams;
>
> [i] place a streamlet request to the server over the one or more network connections for the selected stream;
>
> [j] receive the requested streamlets from the server via the one or more network connections; and
>
> [k] provide the received streamlets for playback of the video.

See ’555 Patent at 19:45-20:15.

6.10. In open disregard of the Commission's remedial orders, iFIT continues to, *inter alia*, import, sell, offer for sale, market, advertise, distribute, transfer and/or solicit agents and distributors in the sale, offer for sale, marketing, distribution, and transfer of imported Fitness Devices that infringe at least these claims. This includes both iFIT's Legacy Products and iFIT's Redesigned Products (collectively, the "Covered Products").

VII. EVIDENCE OF VIOLATIONS OF THE CEASE AND DESIST ORDERS

7.1. iFIT has violated the Commission's CDOs by importing, marketing, distributing, selling, offering for sale, transferring, advertising, and/or soliciting U.S. agents and distributors in the sale, transfer, distribution of Covered Products after the PRP. The Commission expressly found that iFIT's Legacy Products infringe the Asserted Claims. *See* 1265 ID at 254–56. And as confirmed by DISH's analysis herein, iFIT's Redesigned Products also infringe the Asserted Claims.

(a) Infringement

7.2. The manner in which the Covered Products infringe depends upon the version of software installed on each product. iFIT products with a software version below 2.6.85.4257 (*i.e.*, Legacy Products) infringe the Asserted Patents for the same reason as the products in the underlying investigation because they are literally the same products. *See* **Exhibit A** (iFIT Ruling Request) at 1 (explaining that iFIT's purported redesigns applies only to "software version 2.6.85.4257 or later). And iFIT products with a software version of 2.6.85.4257 or later[8] (*i.e.*, Redesigned Products) infringe because they still perform adaptive bitrate streaming in the manner recited in the claims—specifically, by automatically requesting streamlets, at the client device, at a certain bitrate based on current network conditions.

[8] A higher software version number indicates a later version of the iFIT software released later in time.

(1) Legacy Products

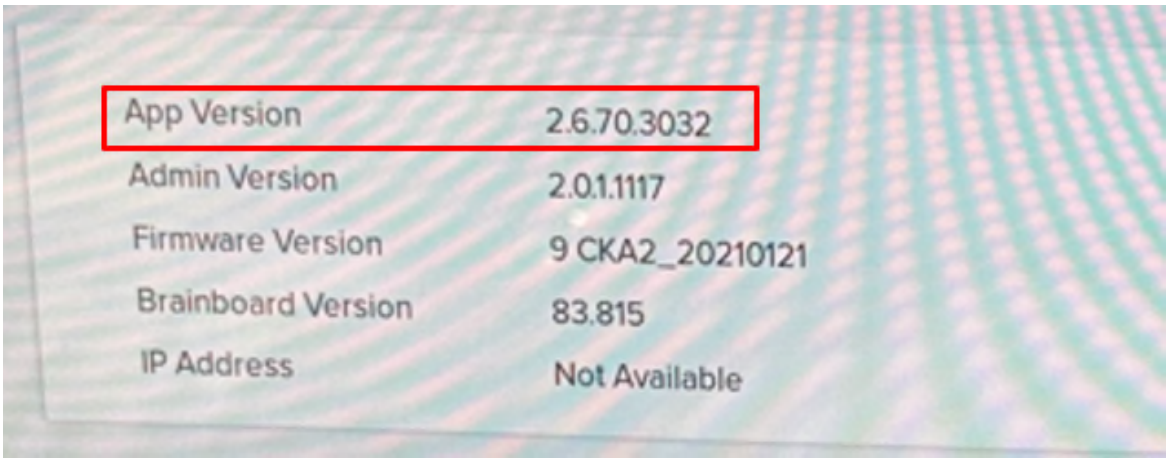
7.3. On July 31, 2023 (*i.e.*, after the PRP), DISH purchased a NordicTrack brand, Commercial S22i model stationary bike from the website https://www.nordictrack.com/. *See* **Exhibit DD** (Invoice). This same brand and model of stationary bike was adjudicated to infringe the Asserted Patents during the underlying investigation:

Respondent(s)	Representative Product	Accused Product(s)
iFit	NordicTrack Commercial S15i running iFit application software available on April 13, 2021	NordicTrack Commercial S15i running iFit application software available on April 13, 2021 is representative, for the purposes of determining DISH's allegations of infringement in this Investigation, of ProForm Vue, NordicTrack Vault (complete), NordicTrack Vault (standalone), ProForm Studio Bike Pro, ProForm Studio Bike Pro 22, FreeMotion r22.9, FreeMotion u22.9, FreeMotion Coachbike, NordicTrack Commercial S15i, NordicTrack Commercial S22i, NordicTrack Commercial VR25, NordicTrack Commercial R35, NordicTrack Commercial VU 19, NordicTrack Commercial VU 29, ProForm R10, NordicTrack RW600, NordicTrack RW700, NordicTrack RW900, NordicTrack X22i, NordicTrack X32i, NordicTrack Commercial 1750, NordicTrack Commercial 2450, NordicTrack Commercial 2950, NordicTrack EXP 7i, NordicTrack EXP 10i, NordicTrack T 6.5 Si, NordicTrack FS10i, NordicTrack FS14i, NordicTrack Commercial 9.9, NordicTrack Commercial 14.9, and NordicTrack SpaceSaver SE9iproducts running iFit application software available on April 13, 2021

Commercial S15i, NordicTrack Commercial S22i, NordicTrack Commercial VR25,

See 1265 DI at 18; *see also id.* at 144, 145, 153, 157, 158, 159.

7.4. Upon receiving the NordicTrack brand, Commercial S22i model stationary bike, DISH confirmed that the software installed on the product was version 2.6.***70***.3032:



App Version	2.6.70.3032
Admin Version	2.0.1.1117
Firmware Version	9 CKA2_20210121
Brainboard Version	83.815
IP Address	Not Available

But iFIT's purported redesign applies only to "software version 2.6.***85***.4257 or later." **Exhibit A** (iFIT Ruling Request) at 1 (emphasis added); *see also* Stipulation of Representativeness at ¶ 4 (stipulating that all Legacy Products "use the same common iFIT software to stream video content over the Internet"). Thus, the NordicTrack brand, Commercial S22i model stationary bike that DISH purchased does ***not*** include iFIT's purported redesign. It therefore infringes the Asserted Patents for the same reasons found in the underlying investigation.

7.5. Although the NordicTrack brand, Commercial S22i model stationary bike that DISH purchased automatically updated its system software after it was turned on, it still infringed the Asserted Patents as imported and sold in the United States. Each of the Asserted Claims in this Enforcement Complaint is an apparatus claim (as opposed to a method claim), and each can be directly infringed by an imported Fitness Device alone (as opposed to, for example, an imported Fitness Device in combination with a domestic server). Thus, iFIT's Fitness Devices merely need to be "configured" to perform the functions recited in the Asserted Claims to infringe (as opposed to, for example, actually performing them in combination with a server). *See, e.g.*, *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607 F.3d 784, 794 (Fed. Cir. 2010) ("Where, as here, a product includes the structural means for performing a claimed function, it can still infringe 'separate and apart' from the operating system that is needed to use the product."). Because they are configured

in the same manner found to infringe in the underlying investigation, iFIT's Legacy Products still infringe the Asserted Claims as imported and sold in the United States.

(2) Redesigned Products

7.6. On March 24, 2023, iFIT introduced three purported redesigns for consideration by CBP's Exclusion Order Enforcement Branch ("EOE Branch") under Part 177. The EOE Branch described those redesigns as set forth below:

> The three redesigns are as follows: (1) modify the fitness devices to force video playback through non-adaptive bitrate streaming, (2) modify the ***servers only*** to provide a single bitrate quality stream to the fitness devices, and (3) modify the fitness devices as proposed in the first redesign and modify the servers as proposed in the second redesign.

Exhibit C (CBP Ruling Letter) at 11 (emphasis added). The EOE Branch "determined not to rule on Redesign 3" because iFIT failed to timely disclose that redesign during the pendency of the Part 177 proceeding. *Id.* at 19. The EOE Branch nevertheless gave iFIT an opportunity to have its third redesign adjudicated after additional discovery and briefing. *Id.* iFIT declined to do so.

7.7. On August 8, 2023, DISH allowed the NordicTrack brand, Commercial S22i model stationary bike that it purchased to receive a software update. The software was updated to version 2.6.85.4363. Based on DISH's inspection of this device, it is DISH's understanding that iFIT has implemented Redesign 1 from the Part 177 proceeding at least on this device.

7.8. iFIT has not implemented its Redesign 2 from the Part 177 proceeding because that purported redesign applies to "servers only," and those redesigned servers would have only provided a single bitrate quality stream to *all* iFIT Fitness Devices. That is not what DISH observed when the software was updated on the NordicTrack brand, Commercial S22i model stationary bike that it purchased. Instead, the server in that redesign provided ***multiple*** bitrate quality streams to that Fitness Device. *See* **Exhibit D** ('554 Claim Chart); **Exhibit E** ('555 Claim

Chart). Thus, iFIT has not implemented its Redesign 2. Otherwise, the NordicTrack brand, Commercial S22i model stationary bike that DISH purchased would have only received a single bitrate quality stream from iFIT's servers.

7.9. iFIT also may have implemented Redesign 3 from the Part 177 proceeding, as that redesign also would allow at least Redesigned Products to receive streams of different bitrates from iFIT's servers, even though Legacy Products would only receive a single bitrate quality stream from iFIT's servers in that redesign. *See* **Exhibit C** (CBP Ruling Letter) at 11 (explaining how iFIT's Redesign 3 is a combination of Redesign 1 and Redesign 2). Implementation of Redesign 3 would be particularly brazen, as iFIT would have done so without either CBP's or the Commission's approval.

7.10. A claim chart showing exemplary aspects of iFIT's Redesigned Products, including NordicTrack, ProForm, and FreeMotion equipment that include iFIT functionality (including, for example, stationary bikes, treadmills, elliptical trainers, strength trainers, rowing machines, and flat-panel fitness devices) that infringe independent claim 16 and dependent claims 17 and 20 of the '554 Patent is attached as **Exhibit D** ('554 Claim Chart).

7.11. An exemplary claim chart showing exemplary aspects of iFIT's Redesigned Products, including NordicTrack, ProForm, and FreeMotion equipment that include iFIT functionality (including, for example, stationary bikes, treadmills, elliptical trainers, strength trainers, rowing machines, and flat-panel fitness devices) that infringe independent claim 16 and dependent claims 10, 11, 14, and 15 of the '555 Patent is attached as **Exhibit E** ('555 Claim Chart).

7.12. iFIT acknowledges that its Redesigned Products "account [for] available bandwidth in order to choose a [] resolution for playback from a menu of options presented by the server." **Exhibit AA** (iFIT Reply ISO Ruling Request) at 13.

> iFIT notes in its request that the [Redesigned] Products ***take into account available bandwidth in order to choose a fixed resolution for playback from a menu of options presented by the server***, but that the chosen stream which remains fixed without adapting to other resolutions regardless of network conditions.

Id.

> These [Redesigned Products] may ***pick which bitrate they will use for fixed streaming***, i.e., ***choosing an appropriate bitrate and resolution*** and staying fixed on that bitrate version for the duration of video playback.

Exhibit A (iFIT Ruling Request) at 14. Thus, iFIT admits that its Redesigned Products perform an initial, adaptive stream selection based on bandwidth. This initial adaptive selection by itself plainly meets the "stream selection" limitations of the Asserted Claims, which merely require the client device to "select a specific one of the … stream[s] based upon a determination by the end user station to select a higher or lower bitrate version of the streams."[9]

7.13. Nevertheless, iFIT has previously argued that these limitations require something more, beyond what the plain language of the "stream selection limitations" require. Specifically, iFIT has argued that the "stream selection" limitations require repeated and continuous shifting between bitrates during streaming based on ongoing network conditions:

> Both the '554 and '555 patents ***require the device to upshift (select) or downshift (select) to a higher or lower bitrate stream***. ***They must up- or down-shift the stream to adapt to a change in network conditions***. Picking the starting stream's quality is not up- or down-shifting. It is simply providing the baseline stream. If the device can only stream that baseline quality, it is incapable of "select[ing] a higher or lower bitrate version of the streams."

Exhibit G (iFIT Post-Oral Discussion Brief ISO Ruling Request) at 13.[10]

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[9] The "stream selection" limitations refer to limitations 16[h] of the '554 Patent and 10[h] of the '555 Patent.

[10] The "stream selection" limitation was the sole basis that iFIT contested infringement of the Redesigned Products in the Rule 177 Proceeding. *See* **Exhibit A** (iFIT Ruling Request) at 15-16.

7.14. While DISH disagrees with this interpretation, even if the "stream selection" limitations were to require repeated up- and down-shifting, the single, initial adaptive stream selection performed by iFIT's Redesigned Products is equivalent. iFIT's Redesigned Products perform substantially the same function because they automatically "shift" from a state where no stream is selected to a streaming state at a selected quality level to begin streaming. iFIT's Redesigned Products perform this function in the same way because they make the initial stream selection based on currently available bandwidth. And they achieve substantially the same result because the stream quality is optimized to maximize quality based on network conditions at the time the user begins viewing the stream.

(b) <u>Importation</u>

7.15. iFIT has imported, and continues to import, infringing Fitness Devices into the United States after the PRP in direct circumvention of the LEO. Indeed, iFIT never stopped shipping Covered Products to the United States. iFIT was so determined to continue its sales of the Covered Products that it used foreign trade zones ("FTZs") to avoid interruption of its shipments during the PRP and pending ruling on its Part 177 ruling request. *See* **Exhibit H** (iFIT Email) at 1. This allowed iFIT to, upon information and belief, immediately import Legacy Products from FTZs in the United States starting June 30, 2023—the day iFIT received the EOE Branch's ruling in the Part 177 proceeding. *See, e.g.*, **Exhibit A** (iFIT Ruling Request) at 1 (acknowledging that at least "a limited quantity of devices ... were manufactured and shipped before installation of [redesigned] software"); *see also* 1265 Comm'n Op. at 76 (discussing iFIT's "preferred method of updating software ... through internet or Wi-Fi, and not software stored on physical media").

7.16. Since May 18, 2023—the agreed extended deadline for CBP to allow iFIT's continued importation for consumption—iFIT has imported thousands of units of Covered

Products. They are identified by brand name and model number (*e.g.*, ProForm Pro R10, NordicTrack EXP10i, ProForm Pro 9000, etc.) in publicly available import records. *See* **Exhibit W** (Import Data).

7.17. On information and belief, iFIT continues to import Legacy Products into the United States, rather than update the software of those products prior to importation. Every such importation is a violation of the LEO for the same reasons infringement was found in the 1265 Investigation. iFIT admitted to the EOE Branch that at least "a limited quantity of devices ... were manufactured and shipped before installation of software version 2.6.85.4257." **Exhibit A** (iFIT Ruling Request) at 1. And iFIT explained to the Commission its preference for "updating software ... through internet or Wi-Fi, and not software stored on physical media." 1265 Comm'n Op. at 76. It is therefore DISH's belief that iFIT continues to import Legacy Products into the United States and to push updates to those Fitness Devices after they are sold to consumers. And customers have figured out that they can prevent software updates from installing and continue using earlier, infringing versions of the iFIT software. *See., e.g.*, **Exhibit J** (https://www.reddit.com/r/nordictrackandroid/comments/ybxcvi/preventing_original_ifit_from_installing_over/).

7.18. If iFIT has since transitioned to importing products with updated software (*i.e.*, Redesigned Products), those imports are in violation of the LEO based on the infringement shown in **Exhibit D** ('554 Claim Chart) and **Exhibit E** ('555 Claim Chart). And even if, *arguendo*, it is determined that the Legacy Products iFIT imported and, upon information and belief continues to import, are determined not to infringe the Asserted Patents by virtue of updates to their software after they are imported and sold in the United States, the importation of those Legacy Devices is still in violation of the LEO based on the infringement shown in **Exhibit D** ('554 Claim Chart)

and **Exhibit E** ('555 Claim Chart), which is contributed to and induced by iFIT's importation and updating of those Legacy Products.

(c) <u>Marketing, Distributing, Selling, Offering for Sale, Transferring, and Advertising</u>

7.19. As with its shipping and importing, iFIT's marketing, distributing, selling, offering for sale, transferring, advertising, and/or solicitation of U.S. agents and distributors in the sale, transfer, and/or distribution of Covered Products has been largely unaffected and uninterrupted by the Commission's remedial orders. iFIT does not appear to have stopped, or even paused, any of these activities. In fact, iFIT has not even changed the model numbers or other identifiers to suggest that the Redesigned Products differ in any way from the Legacy Products. It has simply been business as usual for iFIT.

7.20. For example, iFIT continues to market, offers to sell, and advertise Covered Products on its websites www.ifit.com, www.freemotionfitness.com, www.nordictrack.com, and www.proform.com. *See, e.g.*, **Exhibit K** (https://www.ifit.com/equipment), *last accessed* August 22, 2023; **Exhibit L** (https://freemotionfitness.com/machine-for-home-gym/r22-9-recumbent-bike/), *last accessed* August 23, 2023; **Exhibit M** (https://www.nordictrack.com/exercise-bikes/s22i-studio-bike), *last accessed* August 23, 2023; **Exhibit N** (https://www.proform.com/exercise-bikes/studio-bike-pro), *last accessed* August 23, 2023.

7.21. iFIT continued to market, offers to sell, and advertise Covered Products on its websites www.ifit.com, www.freemotionfitness.com, www.nordictrack.com, and www.proform.com between the March 8, 2023 issuance of the CDOs and iFIT's March 24, 2023 filing of a Part 177 ruling request with the EOE Branch. *See, e.g.*, **Exhibit O** (https://web.archive.org/web/20230315200722/https://www.ifit.com/equipment), *last accessed* August 23 2023; **Exhibit P**

(https://web.archive.org/web/20230314200812/https://www.nordictrack.com/exercise-bikes/s22i-studio-bike), *last accessed* August 23, 2023; **Exhibit Q** (https://web.archive.org/web/20230318210806/https://www.proform.com/exercise-bikes/studio-bike-pro), *last accessed* August 23, 2023.

7.22. iFIT continued to market, offers to sell, and advertise Covered Products on its websites www.ifit.com, www.freemotionfitness.com, www.nordictrack.com, and www.proform.com from when iFIT filed its Part 177 ruling request on March 24, 2023 through the end of the PRP on May 7, 2023. *See, e.g.*, **Exhibit R** (https://web.archive.org/web/20230401052019/https://www.ifit.com/equipment), *last accessed* August 23, 2023; **Exhibit S** (https://web.archive.org/web/20230330113044/https://www.nordictrack.com/exercise-bikes/s22i-studio-bike), *last accessed* August 23, 2023; **Exhibit T**, (https://web.archive.org/web/20230411155158/https://www.proform.com/exercise-bikes/studio-bike-pro), *last accessed* August 23, 2023.

7.23. iFIT continued to market, offers to sell, and advertise Covered Products on its websites www.ifit.com, www.freemotionfitness.com, www.nordictrack.com, and www.proform.com from when the May 18, 2023 importation deadline passed until the EOE Branch's June 30, 2023 non-infringement filing. *See, e.g.*, **Exhibit U** (https://web.archive.org/web/20230512022840/https://www.ifit.com/equipment), *last accessed* August 23, 2023; **Exhibit V** (https://web.archive.org/web/20230516150034/https://www.nordictrack.com/exercise-bikes/s22i-studio-bike), *last accessed* August 23, 2023; **Exhibit W** (https://web.archive.org/web/20230529030610/https://www.proform.com/exercise-bikes/studio-

bike-pro), *last accessed* August 23, 2023. iFIT's marketing, offering to sell, and advertising of Covered Products simply never stopped.

7.24. iFIT is aware of the LEO, the CDO, and the penalties it may face due to iFIT's violations of these orders. Indeed, DISH gave iFIT actual notice of its continued infringement of the Asserted Patents through DISH's response to iFIT's Ruling Request with the EOE Branch on May 11, 2023. *See* **Exhibit X** (Response to Ruling Request). In addition, iFIT also has been given actual notice of its violation of the CDO, and its continued infringement of the Asserted Patents, by DISH's service of this Complaint on iFIT at the time of filing with the Commission.

(d) Soliciting Agents and Distributors

7.25. iFIT also is soliciting agents and distributors to engage in the sale after importation, transfer, and distribution of infringing Fitness Devices in the United States. For example, iFIT also markets, offers to sell, and advertises Covered Products on various third-party websites, including Amazon.com. *See, e.g.*, **Exhibit Y** (https://www.amazon.com/NordicTrack-Commercial-S22i-Studio-Cycle/dp/B08KBWQ9FJ/), *last accessed* August 22, 2023; **Exhibit Z** (https://www.amazon.com/ProForm-Studio-Touchscreen-30-Day-Membership/dp/B0935BJ6QG/), *last accessed* August 22, 2023.

7.26. Neither iFIT nor any party acting in concert with iFIT has received consent or a license from DISH to engage in activities that are prohibited by the LEO or CDOs. As such, iFIT is in direct violation of the Commission's orders. iFIT's violations of the Commission's remedial orders will continue unless action is taken.

VIII. RELATED LITIGATION AND PROCEEDINGS

8.1. DISH identifies the below related litigation and proceedings between DISH and the Proposed Respondents.

(a) <u>Request for U.S. Customs and Border Protection Ruling</u>

8.2. On March 24, 2023, iFIT requested an administrative ruling under Part 177 from the EOE Branch related to the Commission's remedial orders in the underlying investigation. *See* **Exhibit A** (iFIT Ruling Request). iFIT submitted three redesigns for consideration that purportedly removed the ability to perform adaptive bitrate streaming. *See id.* at 13-14. The EOE Branch "determined not to rule on Redesign 3" because iFIT failed to timely disclose that redesign during the pendency of the Part 177 proceeding. **Exhibit C** (CBP Ruling Letter) at 19. The EOE Branch nevertheless gave iFIT an opportunity to have its third redesign adjudicated through additional discovery and briefing. *Id.* iFIT declined to do so.

8.3. On June 30, 2023, the EOE Branch determined that iFIT's first and second redesigns are outside the scope of the LEO. **Exhibit C** (CBP Ruling Letter) at 19-20. The EOE Branch's decision is incorrect and unduly narrow. Specifically, the EOE Branch's finding that iFIT's Redesigned Products do not infringe is legally erroneous because it is based entirely on an improper claim construction.

8.4. The central dispute before EOEB was whether the limitation of Claim 16 of the '554 Patent and Claim 10 of the '555 Patent that recites "select a specific one of the … stream[s] based upon a determination by the end user station to select a higher or lower bitrate version of the streams" (the "stream selection" limitation), requires repeatedly shifting between higher or lower streams during playback. DISH argued that the "stream selection" limitation could be satisfied by an initial, adaptive stream selection, while iFIT argued multiple shifts were required. EOEB's analysis regarding this central dispute is reproduced in its entirety below:

> The plain and ordinary meaning of the claim limitations coupled with the way the adaptive bitrate technology is described by the Commission and in the 1265 LEO offers greater support for iFIT's understanding of these claim limitations. In describing the technology at issue, the Commission stated that these patents "allows [the] end user equipment

> to switch between different quality streamlets in response to changing network conditions." Id. at 10. DISH's view would negate the adaptability of the steaming technology at issue and would bleed into other approaches to streaming capability specifically allowed by the Commission. Id. at 84. For instance, the Commission stated that the infringed claims "do not generally cover all fitness devices, or even all fitness devices with streaming capabilities—they cover only infringing apparatuses using a particular method of streaming content (*i.e.*, adaptive, multi-bitrate streaming)." Id. Given the Commission's stance were the interpretation proposed by DISH to stand, every type of fitness device that streams content by selecting a single fixed bitrate stream would be infringing, but such an outcome would contradict what the Commission described in the underlying investigation, as shown above.

Exhibit C (CBP Ruling Letter) at 16-17. Although EOEB claims to have considered the "plain and ordinary meaning," it fails to address the ***actual language*** of the "stream selection" limitations in its analysis. If it had, it would have found no basis to conclude that multiple selections are recited or required, or that a "shift" between quality levels during streaming is required. Instead, only a single "select[ion]" is recited, while the term "shift" is not recited anywhere in the claims, much less in the specific limitation.

8.5. Instead, EOEB relies on the Commission's "Overview of the Technology" at issue as supporting its construction. *See* **Exhibit C** (CBP Ruling Letter) at 16 (citing Comm'n Op. at 10). But this general "[o]verview" does not raise to the level of lexicography or disclaimer required to unseat the plain and ordinary meaning of the disputed limitations. EOEB also cites to the Commission's unremarkable statement that its remedial orders apply only to "infringing apparatuses" as somehow supporting its construction. **Exhibit C** (CBP Ruling Letter) at 17 (citing Comm'n Op. at 84). But here, EOEB puts the cart before the horse by improperly assuming non-infringement of iFIT's Redesigned Products as a predicate to arriving at its construction. This is improper. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996) (construction (step one) must occur ***before*** infringement analysis (step

two)). Indeed, neither citation even addresses the "stream selection" limitations in question. EOEB's analysis is deeply flawed.

(b) <u>Other Litigation</u>

(1) Federal Circuit

8.6. On May 31, 2023, iFIT filed a notice of appeal to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") seeking reversal of the Commission's final determination of violation of section 337. *See iFIT Inc. v. Int'l Trade Comm'n*, CAFC-23-1965, Dkt. 1 (Fed. Cir.). This appeal is still pending before the Federal Circuit, and iFIT's opening appellate brief is due on November 7, 2023.

(2) Other Actions

8.7. On April 13, 2021, DISH filed a complaint against iFIT in the District of Delaware for infringement of the same Asserted Patents. On May 28, 2021, the court granted an unopposed motion for mandatory stay pursuant to 28 U.S.C. § 1659(a). The District of Delaware case remains stayed pending determination of the ITC proceeding, including any appeals therefrom.

8.8. On September 1, 2023, DISH filed a complaint against iFIT in the District of Delaware for infringement of U.S. Patent Nos. 11,470,138 and 11,677,798. Those patents also are titled "Apparatus, System, and Method for Multi-Bitrate Content Streaming" and are part of the same patent family as the Asserted Patents.

IX. APPROPRIATE RELIEF

9.1. WHEREFORE, by reason of the foregoing, DISH respectfully requests that the United States International Trade Commission:

(a) Institute a formal enforcement proceeding, pursuant to 19 C.F.R. § 210.75, to confirm the violation of the Commission's Orders, including as described herein;

(b) Expedite the proceeding and promptly refer this matter to an Administrative Law Judge for issuance of an Initial Determination on the issues of the enforcement violation and remedy requested;

(c) Direct the Administrative Law Judge to permit a necessary and expedited period for fact discovery on iFIT's continued violations of the Commission's Orders; hold a hearing; and issue an Initial Determination on Enforcement as soon as practicable; and

(d) After the enforcement proceeding, in the event the Commission determines that there has been a violation of the Commission Orders, provide the following remedies:

(1) Enforce the CDOs pursuant to 19 U.S.C. § 1337(f) and 19 C.F.R. § 210.75 and prohibit iFIT and any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns from engaging in illegal activities;

(2) Modify the Commission's LEO and/or CDOs pursuant to 19 C.F.R. § 210.75(b)(4) in any manner that would assist in the prevention of the unfair practices that were originally the basis for issuing such Orders or to assist in the detection of violations of such Orders;

(3) Impose the maximum statutory penalties for violation of the Commission's CDOs (including monetary sanctions for each day's violations of the CDO of the greater of $100,000.00 or twice the domestic value of the articles entered or sold, whichever is higher) against iFIT and any of its principals,

stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors and assigns found to be in violation of the CDO;

(4) Bring a civil action in an appropriate United States District Court pursuant to 19 C.F.R. § 210.75(c) and 19 U.S.C. § 1337(f) requesting collection of such civil penalties and the issuance of a mandatory injunction preventing further violation of the CDO; and

(5) Impose such other remedies and sanctions as are appropriate and within the Commission's authority.

Respectfully submitted,

Dated: September 11, 2023

/s/ Lisa M. Kattan

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VERIFICATION OF COMPLAINT

I, James Hanft, declare, in accordance with 19 C.F.R. §§ 210.4 and 210.12(a), under penalty of perjury, that the following statements are true:

1. I am Vice President & Associate General Counsel at DISH Network L.L.C., and I am duly authorized to sign this verification on behalf of the Complainants;

2. I have read the foregoing Complaint;

3. To the best of my knowledge, information, and belief, based upon reasonable inquiry, the allegations or other factual contentions set forth in the foregoing Complaint have evidentiary support or are likely to have evidentiary support after reasonable opportunity for further investigation or discovery;

4. To the best of my knowledge, information, and belief, based upon reasonable inquiry, the claims and other legal contentions set forth in the foregoing Complaint are warranted by existing law or by good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

5. The foregoing Complaint is not being filed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Executed this 11th day of September, 2023.

James Hanft

James Hanft