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	7	Direct Fax: 303.623.9222 E-mail: <u>amassaro@lrrlaw.com</u> Attorneys for Plaintiff Clim-A-Tech Industries, Inc.		
	8	Adomeys for Frammer Chine A-reen industries, inc.		
	9	UNITED STATES DISTRICT COURT		
	10	DISTRICT OF ARIZONA		
te 120	11	Clim-A-Tech Industries, Inc., a Minnesota corporation	NO. CV-15-00873-PHX-GMS	
st Washington Street, Suite 1200 x, AZ 85004-2595	12	Plaintiff,	FIRST AMENDED DECLARATORY JUDGMENT	
	13	VS.	COMPLAINT (JURY TRIAL DEMANDED)	
Washington Str AZ 85004-2595	14	William A. Ebert, an individual, and		
201 East Wa Phoenix, AZ	15	Sunwest Supply, Inc., an Arizona corporation,		
	16	Defendants.		
LEWIS ROCA ROTHGERBER	17			
	18	This is an action seeking Declaratory Judgment that United States Patent No.		
	19	6,746,581, which is believed to be owned by named inventor William A. Ebert (and		
	20	any undisclosed assignees or licensees), has not been infringed by Clim-A-Tech		
	21	Industries, Inc.; and/or is invalid and unenforceable under 35 U.S.C. §§ 102, 103, and/		
	22	or 112. <sup>1</sup>		
	23		Parties	
	24		("Clim-A-Tech") is a Minnesota corporation	
	25			
	26	<sup>1</sup> Clim-A-Tech filed its Complaint for Declaratory Judgment in U.S. District Court for the District of Arizona on May 14, 2015. Defendants have not filed answers or other responsive pleadings to the Complaint for Declaratory Judgment. On June 25, 2015, Clim-A-Tech submitted its Notice of Voluntary Withdrawal (Without Prejudice) of Its Third Cause of Action for unenforceability of Ebert's patent. [Doc. #16.] The First Amended Declaratory Judgment Complaint reflects the voluntary withdrawal (without prejudice) of Clim-A-Tech's cause of action for unenforceability.		
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with a principal place of business at 11117 Excelsior Boulevard, Hopkins, Minnesota
 55343. Clim-A-Tech's primary place for the manufacture and sale of its U shaped
 cathode protector is Clim-A-Tech S.W. Division, 2801 E. Chambers Street, Phoenix,
 Arizona 85040.

5 2. William A. Ebert is a resident of the State of Arizona, and is the named
6 inventor and owner of United States Patent No. 6,746,581 ("the '581 Patent").

Ebert is also the Officer, Director and registered agent for Sunwest
 Supply, Inc. ("Sunwest"), an Arizona corporation with a principal place of business at
 P.O. Box 5091, Tucson, Arizona 85703.

#### Jurisdiction and Venue<sup>2</sup>

4. This Complaint arises under the Patent Laws of the United States, 35 U.S.C. § 100, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

5. This Court has jurisdiction over the subject matter of this action pursuant
to 28 U.S.C. §§ 1331, 1332 and 1338(a), 2201 and 2202, and supplemental jurisdiction
under 28 U.S.C. § 1367. The amount in controversy, exclusive of costs and interest,
exceeds Seventy-Five Thousand Dollars (\$75,000.00).

6. Venue is proper in this judicial district under 28 U.S.C. § 1391(b).

#### General Allegations

7. Clim-A-Tech is a Minnesota-based worldwide supplier of plastic profile extrusions and die-cut flexible components to small and large window & door companies, appliance manufacturers, recreational industry, technology sector, refining/ mining industry, medical industry, retail and other industrial/commercial markets.

8. Clim-A-Tech has been an industry leader since 1969 and after nearly 50
years in custom manufacturing is now an employee-owned company, operated with the
dedication and loyalty of a team of business owners.

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 <sup>&</sup>lt;sup>2</sup> Clim-A-Tech originally filed a Complaint for Declaratory Judgment against Ebert and Sunwest on May 13, 2014 in U.S. District Court for the District of Minnesota, Case No. 0:14-cv-01496-MJD-SER. [Doc. #1.] On May 11, 2015, the District Court dismissed the case for lack of personal jurisdiction. [Doc. #30.]

9. Defendants have for several years had business interests central and
 related to Clim-A-Tech's industry.

3 10. Defendants, their employees, agents, and associates have leveled verbal
4 accusations of patent infringement in the industry and to Clim-A-Tech's current and
5 potential customers.

11. The dispute between the parties came to a head when, on April 30, 2014,
a cease and desist letter was sent on behalf of Sunwest to Clim-A-Tech's Chief
Operating Officer, formally alleging infringement of the '581 Patent by Clim-A-Tech's
manufacture and sale of its U shaped cathode protector.

12. The April 30, 2014, communication demands that Clim-A-Tech cease and desist from all infringing activity relative to the '581 Patent, and further states that a patent license will not be offered.

13. The April 30, 2014, cease and desist demand, and position that no patent license will be offered were and have been maintained by a July 18, 2014,

communication, whereby it was demanded that Clim-A-Tech "stop making, marketing,
and selling its cathode plate edge protectors, i.e., ... drop this product line."

14. Since July 18, 2014, Defendants continue to assert that Clim-A-Tech infringes the '581 Patent.

15. An immediate, real and justiciable controversy exists between the parties.

16. A substantial controversy exists between the parties of sufficient
immediacy and reality to warrant the issuance of a declaratory judgment regarding the
parties' adverse legal interests.

23 17. The Court should adjudicate this action under the Declaratory Judgment24 Act.

First Cause of Action(Declaratory Judgment of Non-Infringement of the '581 Patent)18.Clim-A-Tech realleges and incorporates by reference each of thepreceding allegations of the Complaint as though expressly stated herein.

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1 19. This Declaratory Judgment Action arises under the Patent Laws of the
 2 United States, 35 U.S.C. § 1, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§
 3 2201 and 2202.

20. A present, genuine and justiciable controversy exists between the parties
regarding, among other things, the issue of whether Clim-A-Tech's commercial
manufacture, use, sale, and offer to sell its U shaped cathode protector infringes the
'581 Patent.

8 21. Clim-A-Tech's commercial manufacture, use, sale, and offer to sell the U
9 shaped cathode protector does not infringe the '581 Patent.

22. Clim-A-Tech is entitled to a declaration that the commercial manufacture, use, sale, and offer to sell its U shaped cathode protector does not infringe the '581 Patent.

### Second Cause of Action

(Declaratory Judgment of Invalidity of the '581 Patent)

23. Clim-A-Tech realleges and incorporates by reference each of the preceding allegations of the Complaint as though expressly stated herein.

24. This Declaratory Judgment Action arises under the Patent Laws of the United States, 35 U.S.C. § 1 *et. seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

25. An actual and justiciable controversy exists between the parties regarding the validity of the '581 Patent under 35 U.S.C. §§ 102, 103, and 112.

26. Clim-A-Tech is entitled to a Declaration that the '581 Patent is anticipated, obvious and/or invalid for violation of the On Sale Bar.

27. The claimed invention was on public display at a third-party mining site, by at least as early as November 17, 2000, which is more than a year earlier than the Patent's application date of October 22, 2002.

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28. The '581 Patent is also anticipated, obvious and invalid over International PCT Publication No. WO 97/41280.

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 (Tortious Interference with Existing Business Contracts and Prospective Business Relations against Sunwest Supply, Inc.)
 29. Clim-A-Tech realleges and incorporates by reference each of the
 preceding allegations of the Complaint as though expressly stated herein.
 30. This Declaratory Judgment Action arises under the Patent Laws of the

Third Cause of Action

<sup>6</sup> United States, 35 U.S.C. § 1, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§
7 2201 and 2202.

31. An actual and justiciable controversy exists between the parties regarding the allegations of infringement of the '581 Patent.

32. Clim-A-Tech has valid business relationships with, and reasonable expectations of economic advantage or benefit from, existing and potential customers who purchase Clim-A-Tech's products.

33. Sunwest had knowledge of Clim-A-Tech's valid business relationships and its reasonable expectations of economic advantage and benefit.

34. Sunwest intentionally interfered with Clim-A-Tech's valid business relationships with, and its reasonable expectations of economic advantage or benefit from, those customers.

35. For instance, Sunwest intentionally interfered with Clim-A-Tech's valid business relationships with, and its reasonable expectations of economic advantage or benefit from, those customers by sending to Clim-A-Tech the April 30, 2014, letter purporting to enforce the '581 Patent and demanding that Clim-A-Tech cease and desist from all sales of the U-shaped cathode protector when it was subsequently represented on August 21, 2014, that Sunwest owns no interest in the '581 Patent and had no authority to enforce the '581 Patent.

36. For instance, Sunwest intentionally interfered with Clim-A-Tech's valid
 business relationships with, and its reasonable expectations of economic advantage or
 benefit from, those customers by making untrue, improper and inaccurate statements to
 Clim-A-Tech's customers and colleagues in the industry about the nature, scope and
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merit of the patent infringement allegations, and the procedural posture of this pending
 matter.

37. Sunwest's interference with Clim-A-Tech's valid business relationships
and reasonable expectations of economic advantage or benefit has been and is wrongful
and without justification for at least the reason that such interference has been motivated
by an intent to encourage, solicit, induce or otherwise persuade Clim-A-Tech's existing
and potential customers to purchase Sunwest products instead of Clim-A-Tech's
products.

9 38. Clim-A-Tech has sustained damages as a result of Sunwest's conduct,
10 including but not limited to the attorneys' fees required to clear the issue, resolve and
11 settle rights.

39. Clim-A-Tech will continue to suffer irreparable injury, for which Clim-ATech has no adequate remedy at law, unless and until Sunwest is enjoined from
interfering with Clim-A-Tech's valid business relationships and reasonable expectations
of economic advantage or benefit.

#### Demand for Jury Trial

Clim-A-Tech hereby demands a jury trial as to all matters so triable.

## Prayer for Relief

WHEREFORE, Clim-A-Tech prays for judgment against Defendants:

- A. Declaring that U.S. Patent 6,746,581 is not infringed by Clim-A-Tech;
- B. Declaring that U.S. Patent 6,746,581 is invalid under 35 U.S.C. §§ 102, 103 and 112;
- C. Issuing a preliminary and permanent injunction enjoining Defendants and their agents, employees, officers, servants, representatives, successors and assigns, and others in active concert, privity with them from tortious interference with Clim-A-Tech's existing or prospective business relations, including but limited to enforcing U.S. Patent 6,746,581 against any of Clim-A-Tech's current or future customers;
- D. Awarding Clim-A-Tech compensatory and/or exemplary damages;
- E. Awarding Clim-A-Tech its attorneys' fees, costs and expenses in this action under 35 U.S.C. § 285; and

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	1	F. Awarding such other and further relief as this Court may deem just and equitable.	
	2	DATED: June 30, 2015.	
	3	LEWIS ROCA ROTHGERBER LLP	
	4		
	5	By: <u>/s/ Kris J. Kostolansky</u> Kris J. Kostolansky	
	6	Attorneys for Plaintiff Clim-A-Tech Industries, Inc.	
	7	Automeys for Flummin enin AV feen industries, inc.	
	8	CERTIFICATE OF SERVICE	
	9		
200	10	I certify that on June 30, 2015, I served the foregoing via U.S. Mail and electronically to the following:	
uite 12	11		
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East W enix, A	15	Fax: 520.322.5585 Email: pgoldman@dmyl.com	
201 I Phoe	16	Attorneys for William A. Ebert and Defendants Sunwest Supply, Inc.	
LEWIS ROCA ROTHGERBER	17	Sunwest Suppry, Inc.	
	18	By <u>Peggy J. Henke</u>	
	19	Employee of Lewis Roca Rothgerber LLP	
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