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Attorneys for Plaintiff
WhiteWater West Industries, Ltd.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

WHITEWATER WEST INDUSTRIES,
LTD.,

Plaintiff,

vs.

AMERICAN WAVE MACHINES, INC.,

Defendant.

Case No. '22CV0729 BEN BLM

**COMPLAINT FOR
DECLARATORY JUDGMENT OF
INVALIDITY,
UNENFORCEABILITY, AND
NONINFRINGEMENT**

DEMAND FOR JURY TRIAL

Plaintiff WhiteWater West Industries, Ltd. ("WhiteWater") complains and alleges against defendant American Wave Machines, Inc. as follows:

NATURE OF ACTION

1. WhiteWater seeks a declaration that U.S. Patent Nos. 8,434,966 entitled, "SEQUENCED CHAMBER WAVE GENERATOR APPARATUS AND METHOD" ("966 Patent"); 10,662,663 entitled, "WAVE GENERATOR WITH WAVE DAMPING" ("663 Patent"); 9,279,263 entitled, "SEQUENCED CHAMBER WAVE GENERATOR APPARATUS AND METHOD" ("263 Patent"); and 10,738,492 entitled "AQUATIC SPORTS AMUSEMENT APPARATUS" ("492 Patent") (collectively, the "Challenged Patents") are invalid

1 and unenforceable, and that WhiteWater does not infringe any of the claims of the
 2 Challenged Patents. A true and correct copy of each of the '966 Patent, the '663
 3 Patent, the '263 Patent, and the '492 Patent is attached hereto, respectively, as
 4 **Exhibits 1–4.**

5 **THE PARTIES**

6 2. WhiteWater is a foreign corporation, incorporated and domiciled in the
 7 Country of Canada, with its principal place of business at 180-6651 Fraserwood
 8 Place, Richmond, British Columbia V6W 1J3.

9 3. WhiteWater is the world's largest designer and manufacturer of water
 10 parks. Since it began business more than 40 years ago, WhiteWater has completed
 11 over 5,000 projects across theme parks, cruise ships, water parks (indoor and
 12 outdoor), and hotels and resorts all around the world. Recognized as an industry
 13 leader, WhiteWater has won countless industry and business awards.

14 4. American Wave Machines, Inc. ("AWM") is a California corporation,
 15 with a principal place of business at 224C South Cedros Avenue, Solana Beach,
 16 California 92075.

17 **JURISDICTION AND VENUE**

18 5. This action arises under the Declaratory Judgment Act of 1934 (28
 19 U.S.C. §§ 2201-2202), Title 28 of the United States Code, for the purposes of
 20 determining an actual and justiciable controversy between the parties, and the
 21 patent laws of the United States, Title 35 of the United States Code. This Court has
 22 subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

23 6. This Court has personal jurisdiction over AWM because AWM is a
 24 corporation organized and existing under the laws of California and, on information
 25 and belief, its principal place of business is in Solano Beach, California.

26 7. An actual and justiciable controversy exists between WhiteWater and
 27 AWM with respect to whether WhiteWater is liable for alleged infringement of the
 28 Challenged Patents and whether the Challenged Patents are valid and enforceable.

1 The controversy is immediate and substantial because, as detailed further below,
 2 AWM has sent cease-and-desist letters specifically asserting that WhiteWater's
 3 Endless Surf™ product infringes the Challenged Patents. AWM has sent such
 4 cease-and-desist letters threatening litigation to WhiteWater's business associates
 5 and potential customers, as well as to WhiteWater's subsidiary Flow Rider, Inc. in
 6 San Diego, California. In addition, in May 2022, AWM filed a complaint in Florida
 7 State Court against defendants 80 Acres Surf, LLC, AW Asset Management, LLC,
 8 and SR II, LLC, f/k/a Surf Ranch Florida, LLC. While AWM's Florida State Court
 9 action is not against WhiteWater and does not assert a claim for patent
 10 infringement, the complaint alleges that WhiteWater's Endless Surf™ product
 11 infringes AWM's patents. WhiteWater contends that the Challenged Patents are
 12 invalid, unenforceable, and/or not infringed by WhiteWater's Endless Surf™
 13 product. Absent a declaration of noninfringement, invalidity, and/or
 14 unenforceability, AWM will continue to wrongfully assert that WhiteWater's
 15 Endless Surf™ product infringes the Challenged Patents, thereby causing
 16 WhiteWater irreparable injury and damage. Such injury includes, among other
 17 things, uncertainty as to whether the development, use, and sale of the Endless
 18 Surf™ product will be free from infringement claims based on the Challenged
 19 Patents.

20 8. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because
 21 AWM is a California corporation subject to personal jurisdiction in the State of
 22 California, its principal place of business is in Solano Beach, and it is therefore
 23 deemed to reside in this District.

24 **GENERAL ALLEGATIONS**

25 9. The earliest effective filing date of any of the Challenged Patents is
 26 March 3, 2012.

27 10. In 1989, more than two decades *before* AWM filed the first patent
 28 application resulting in the Challenged Patents, WhiteWater designed and installed

1 Disney's Typhoon Lagoon at Disney World located in Orlando, Florida.

2 11. Since 1989, WhiteWater has continued designing, manufacturing, and
3 installing wave pools and surf pools, having successfully installed more than 300
4 such pools worldwide.

5 12. In May 2020, WhiteWater launched its next generation of surf pools,
6 called the Endless Surf™ product that incorporates wave generating technology
7 used in many of its earlier wave pools and surf pools. Such technology includes, but
8 is not limited to, chambers, valves, and controllers used in WhiteWater's wave
9 pools and surf pools in many instances more than a decade before the filing of the
10 Challenged Patents.

11 13. Since the launch of the Endless Surf™ product, AWM, through its
12 counsel, has sent multiple cease-and-desist letters threatening legal action to
13 WhiteWater's business associates, potential customers, and at least one subsidiary.

14 14. One such cease-and-desist letter, attached hereto as **Exhibit 5**, was
15 sent to Cactus Surf Park located in the greater Phoenix, Arizona area. The letter is
16 dated February 24, 2022, and includes the following statements:

17 I write to put you on notice that an attraction you are promoting, Endless Surf,
18 infringes AWM's intellectual property.

19 Under U.S. law, whoever without authority makes, uses, offers to sell or sells any
20 patented invention, or contributes to or induces the same, infringes the patent (35 U.S.C.
21 § 271). The law further provides that the patent owner may obtain a court order
22 preventing the continued use of an infringing device or practice of an infringing method
(35 U.S.C. § 283) and may recover up to three times the amount of money damages
23 found adequate to compensate for the infringement (35 U.S.C. § 284). In addition, a
24 patent owner prevailing in a patent infringement suit may be entitled to recover its
25 attorneys' fees from the losing party (35 U.S.C. § 285).

26 Your offer to sell and sale of the infringing Endless Surf attraction, an attraction
27 that incorporate AWM's patented features, has caused and continues to cause AWM and
28 its licensees significant damage. AWM has no business alternative but to vigorously
enforce its rights. As such, AWM demands that you and your company immediately
cease and desist from any manufacture, importation, use, sale, offer for sale or other
distribution of the Endless Surf attraction.

Should Cactus Surf Park, or its partners, continue to misappropriate AWM's
intellectual property, AWM will seek legal redress to protect its patent rights. Please
govern yourself accordingly.

1 15. The cease-and-desist letter sent to Cactus Surf Park also specifically
2 lists the Challenged Patents in the “Exhibit” page (Ex. 5, at last page).

3 16. Another such cease-and-desist letter threatening litigation was sent to
4 WhiteWater subsidiary FlowRider, Inc. The letter was sent via U.S. mail, with the
5 envelope addressed to FlowRider, Inc.’s office at 3655 Pacific Highway, #A, San
6 Diego, California, 92101. The letter and copy of the envelope are attached hereto as
7 **Exhibit 6**.

8 17. On information and belief, similar cease-and-desist letters threatening
9 litigation have been sent to at least Linkcity, Île-de-France; the City of Gilbert,
10 Arizona; Beach Street Development; and the City of San Juan Capistrano.

11 18. On information and belief, AWM plans to continue to send similar
12 cease-and-desist letters threatening litigation to WhiteWater’s business associates
13 and potential customers.

14 19. On information and belief, in addition to sending such cease-and-desist
15 letters threatening litigation, AWM has verbally threatened one or more of
16 WhiteWater’s business associates and potential customers with legal action and
17 claims of patent infringement if they purchase an Endless Surf™ product or partner
18 with WhiteWater in promoting and/or otherwise assisting WhiteWater in the sale or
19 installation of an Endless Surf™ product.

20 20. On information and belief, AWM continues to threaten verbally and/or
21 in writing WhiteWater’s business associates and potential customers with legal
22 action and claims of patent infringement for the Endless Surf™ product.

23 21. In addition, in May 2022, AWM filed a complaint in Florida State
24 Court, attached hereto as **Exhibit 7**, against defendants 80 Acres Surf, LLC, AW
25 Asset Management, LLC, and SR II, LLC, f/k/a Surf Ranch Florida, LLC. While
26 AWM’s Florida State Court action is not against WhiteWater and does not assert a
27 claim for patent infringement, the complaint alleges that “Whitewater embarked on
28 a marketing campaign to introduce a never before built infringing offering called

1 Endless Surf and made a public announcement in May 2020.” (Ex. 7, at ¶ 75; *see*
 2 *also id.* at ¶¶ 73-78 (section entitled “AWPO Restarts Project with Infringing
 3 WhiteWater”).)

4 22. Such actions by AWM have and continue to cause a harmful impact on
 5 WhiteWater’s promotion and sales of its Endless Surf™ product.

6 **The Challenged Patents**

7 **Ownership of the Challenged Patents**

8 23. According to the United States Patent and Trademark Office
 9 (“USPTO”) records, AWM is identified as the assignee of each of the Challenged
 10 Patents.

11 24. On information and belief, AWM holds an enforceable interest in the
 12 Challenged Patents. Should WhiteWater discover that the true ownership of the
 13 Challenged Patents requires the addition of parties, or the dismissal of parties,
 14 WhiteWater will promptly amend its Complaint to name the proper parties.

15 **The ’966 Patent**

16 25. The ’966 Patent was filed on March 3, 2012 and does not claim
 17 priority to any earlier application. The Abstract of the ’966 Patent states that the
 18 patent discloses “a wave generating apparatus and method is provided in which a
 19 controller actuates a plurality of wave generating chambers in sequence using a
 20 delay between actuation of each chamber to produce a rideable wave in a pool.”
 21 (Ex. 1, at [57].)

22 26. On information and belief, the ’966 Patent admits that wave generators
 23 having multiple wave generating chambers are prior art, but claims that because the
 24 prior art activates the chambers simultaneously, the resultant wave travels
 25 perpendicularly to the chambers, making it inferior. (Ex. 1, at 1:20-58.)

26 27. On information and belief, to purportedly solve the problem caused by
 27 simultaneously activating the chambers, the ’966 Patent discloses activating them
 28 in sequence. The ’966 Patent alleges that the subject invention “is a new and

1 improved wave generator apparatus and method that in various example
 2 embodiments may include sequenced chambers adapted to create a rideable wave
 3 that travels in a direction that is not perpendicular to the wave generating apparatus
 4 such that the wave strength continues to be replenished by the wave generator as it
 5 moves across the pool.” (Ex. 1, at 2:22-28.)

6 28. On information and belief, to activate the chambers in sequence, the
 7 ’966 Patent discloses the use of a controller that “may be connected to the
 8 chambers” to activate each chamber in turn after a “delay” (as opposed to
 9 simultaneously). (Ex. 1, at 2:31-38.) On information and belief, as of March 3,
 10 2012, using a controller to sequentially activate wave generating chambers in a
 11 plurality to create a desired wave trajectory was already well known in the prior art.

12 **The ’663 Patent**

13 29. The ’663 Patent was granted from a continuation-in-part application
 14 that claims priority to an application filed on September 27, 2016. (Ex. 2). The ’663
 15 Patent claims are directed to a wave generating apparatus with three main aspects: a
 16 wave generator (20), a wave pool (15), and a wave-damping trough (30). (Ex. 2, at
 17 Fig. 3A.)

18 30. On information and belief, the ’663 Patent is directed to a wave
 19 generator for use in a pool having a deep edge and a “beach” edge. Claim 1 of the
 20 ’663 Patent states that the wave pool has at least two portions, with each portion
 21 being sloped, and with the first sloped portion having a steeper slope than the
 22 second sloped portion, which, on information and belief, is a re-creation of natural
 23 formations that create waves at the seashore as a wave moves from deep water
 24 toward the beach.

25 31. On information and belief, the ’663 Patent claims a “wave-damping
 26 trough” that is separated from the wave pool by a mound. According to the only
 27 independent claim, when the wave generator is not actuated, the wave pool and the
 28 wave-dampening trough each maintain a separate static body of water below the

1 mound height. When the wave generator is actuated, a wave formed at the deep end
 2 travels the length of the pool, and spills over the mound into the wave-damping
 3 trough. The wave damping trough dampens the wave energy as the wave water
 4 enters the trough, and also dampens the wave backwash.

5 32. On information and belief, such wave damping troughs have been used
 6 to control erosion (i.e., to dampen waves) on seashores for decades, and have been
 7 used in wave pools at least a decade before the '663 Patent was filed, and were well
 8 known in the prior art at the time the '663 Patent was filed.

9 **The '263 Patent**

10 33. The '263 Patent is a continuation-in-part application of the '966 Patent
 11 and claims priority thereto, having an earliest possible priority date of March 3,
 12 2012. On information and belief, the '263 Patent discloses a pool, a plurality of
 13 chambers, valve structures for each of the plurality of chambers, and a region of the
 14 pool that extends beyond the end of the chambers. The plurality of chambers each
 15 are independently controlled by means of a controller to selectively release water
 16 from each chamber into the pool. (Ex. 3, at Figs. 2 and 4.)

17 34. Similar to the '966 Patent, to which it is related, on information and
 18 belief, the '263 Patent admits that wave generators having multiple wave generating
 19 chambers are prior art, but claims that because the prior art activates the chambers
 20 simultaneously, the resultant wave travels perpendicularly to the chambers, making
 21 it inferior. (Ex. 3, at 1:20-58.)

22 35. On information and belief, the '263 Patent alleges that the subject
 23 invention "is a new and improved wave generator apparatus and method that in
 24 various example embodiments may include sequenced chambers adapted to create a
 25 rideable wave that changes the breaking characteristics of a wave by creating a
 26 surging motion in the pool that causes the wave to pitch further out into the pool."
 27 (Ex. 3, at 2:34-39.)
 28

8 The '492 Patent

39. On information and belief, the '492 Patent discloses and claims a swimming pool, a plurality of wave generating chambers, fans, a controller and a plenum. (Ex. 4, at [57].) The plenum is disclosed as being “pneumatically connected to each chamber and a plurality of fans is connected to the plenum to pressurize” it. (*Id.*) A plurality of sensors and vents are connected to the plenum, associated with the plurality of fans. A controller is connected (i) to sensors to measure the pressure; and (ii) if the pressure measured is greater than a preset point of pressure, a vent is actuated to release the pressure. (*Id.*)

41. On information and belief, the problem the alleged '492 Patent claims to solve is the inability to create a stable air flow from the fans, as the fans used to create the needed air pressure often operate in an unstable region, which leads to several drawbacks including inaccurate control of air pressure, fans inefficiently

1 drawing power without contributing the needed pressure, and fans that prematurely
2 wear. (Ex. 4, at 1: 25-50.)

3 42. On information and belief, the '492 Patent's proposed solution is to
4 use plenum sensors to measure the pressure in the plenum and plenum vents to
5 release pressure from the plenum upon actuation, as determined by the controller.
6 The actuation of the vents by the controller may be for a preset period of time or
7 until a second preset set point is reached. (Ex. 4, at 2: 5-19.) On information and
8 belief, such techniques of controlling pressure within the plenum were already well
9 known in the prior art as of the filing date of the '492 Patent.

10 **The Challenged Patents Are Invalid**

11 43. The claims of the Challenged Patents are invalid for failure to satisfy
12 one or more of the conditions for patentability in Title 35 of the United States Code,
13 including 35 U.S.C. §§ 102, 103, 112, and other judicially created bases for
14 invalidation.

15 44. For example, as set forth in Petitions of *Inter Partes Review* filed by
16 WhiteWater against each of the Challenged Patents with the United States Patent
17 Trial and Appeal Board ("PTAB") prior to the filing of this complaint (collectively,
18 the "IPR Petitions"), each of the Challenged Patents is invalid based upon prior art
19 that anticipates each of the claims of the Challenged Patents and/or renders such
20 claims obvious. The IPR Petitions are hereby incorporated by reference. While the
21 IPR Petitions rely on specific prior art printed publications and include sufficient
22 discussion to demonstrate the invalidity of the Challenged Patents, there are
23 additional references which further demonstrate the invalidity of the Challenged
24 Patents.

25 45. In addition to the Challenged Patents being invalid based upon the
26 prior art references relied upon to support the IPR Petitions, on information and
27 belief, each of the Challenged Patents is invalid and/or unenforceable based upon
28 prior art not eligible to support an *inter partes* proceeding. For example, such prior

art includes the following pools that anticipate or render obvious, either alone or in combination with one or more of each other, one or more of the Challenged Patents:

- a. Darwin Wave Lagoon (Darwin, Australia)
(<https://www.waterfront.nt.gov.au/wave-lagoon>) – opened in July 2008;
- b. Hawaiian Falls Water Park – Oahu Bay Wave Pool (Garland, TX)
(<https://hfalls.com/garland/attractions.php>) – May 2008;
- c. Six Flags Wave Pool (Agawam, MA)
(<https://www.aquaticgroup.com/our-work-details/six-flags-new-england/>) – reopening after renovation on May 5, 2000;
- d. Mandalay Bay Wave Pool (Las Vegas, NV)
(<https://www.murphyswaves.com/projects/mandalay-bay/>) – opened March 2, 1999;
- e. Mount Olympus Wave Pool (Wisconsin Dells, WI)
(https://www.aquaticsintl.com/awards/poseidons-rage-at-mt-olympus-water-theme-resort-wisconsin-dells-wis_o) – opened June 30, 2007;
and
- f. Kentucky Kingdom (Louisville, KY)
(<https://www.aquaticgroup.com/our-work-details/kentucky-kingdom/>)
(<https://archive.courierpress.com/news/louisvilles-kentucky-kingdom-set-to-reopen-ep-504725148-324924071.html/#>) – renovated and reopened May 2014.

46. By way of example, on information and belief, the alleged invention claimed in the '663 Patent was in public use or on sale for years prior to the '663 Patent's earliest priority date of September 27, 2016¹: the wave pool in the

¹ Plaintiff does not concede that claims of the '663 Patent, which issued from a continuation-in-part application, are entitled to the 2016 priority date. However, for purposes of this complaint, the references constitute prior art even under the earlier date.

1 Kentucky Kingdom water park in Louisville, Kentucky, which opened in May
 2 2014, employed each of the features claimed in the '663 Patent, including a wave
 3 generator, a pool floor with two different sloped portions, and a wave damping
 4 trough.

5 47. In addition to the Challenged Patents being invalid based upon the
 6 prior art references relied upon to support the IPR Petitions, the Challenged Patents
 7 are invalid based on additional prior art references, whether alone or in
 8 combination, including in combination with prior art references relied upon in the
 9 IPR Petitions.

10 48. The examples of invalidating prior art provided herein are intended as
 11 a non-exhaustive list of examples only. On information and belief, other
 12 invalidating prior art exists that renders the Challenged Patents invalid under 35
 13 U.S.C. §§ 102 and/or 103.

14 49. On information and belief, when AWM filed the applications that
 15 issued as the Challenge Patents, AWM was aware of (i) numerous patents,
 16 including its own, (ii) printed publications, and (iii) other references that were
 17 known and/or available years before the earliest claimed priority dates of the
 18 Challenged Patents, which render each of the Challenged Patents invalid and/or
 19 unenforceable.

20 **The Challenged '966 and '263 Patents**

21 **Are Unenforceable for Inequitable Conduct - Fujiwara**

22 50. 37 CFR § 1.56 imposes upon the patentee a duty to disclose
 23 information material to patentability.

24 51. The '966 and '263 Patents include the following characterization of
 25 Japanese Patent Application No. 04-037314 (JPO Publication No. 05-202626) to
 26 Fujiwara ("Fujiwara") (attached hereto as **Exhibit 8**): "App. No. 04-037314 (JPO
 27 Publication No. 05-202626) discloses a pool that produce waves that travel in a
 28 perpendicular direction from one side toward the other side of the pool." (Ex. 1, at

1 1:33-36; Ex. 3, at 1:47-50.) Fujiwara, however, contradicts AWM's
2 characterization.

3 52. During prosecution of the '966 and '263 Patents, AWM submitted an
4 Invention Disclosure Statement to the Patent Office, which included Fujiwara along
5 with a partial English translation of Fujiwara submitted to the Patent Office.

6 53. On information and belief, Fujiwara was material to the patentability
7 of the '966 and '263 Patents.

8 54. On information and belief, AWM was aware at the time it prosecuted
9 the applications that issued as the '966 and '263 Patents that its characterization of
10 Fujiwara was inaccurate and that the translation of Fujiwara provided to the Patent
11 Office was incomplete and inaccurate.

12 55. On information and belief, AWM's failure, both at the time of
13 disclosure of Fujiwara and throughout the prosecution of the '966 Patent, to provide
14 the Patent Office with a complete and accurate translation and/or correct the
15 characterization of Fujiwara in the '966 and '263 Patent applications prevented the
16 Patent Office from appreciating the significance of Fujiwara to the patentability of
17 the '966 and '263 Patents.

18 56. On information and belief, had the Patent Office been provided with a
19 complete and accurate translation of the disclosure of Fujiwara and/or a correct
20 characterization of Fujiwara in the '966 and '263 Patent applications during the
21 prosecution of the '966 and '263 Patents the Patent Office would have understood
22 the significance of the disclosure contained within Fujiwara, it would not have
23 granted the '966 and '263 Patents.

24 57. On information and belief, AWM's ongoing failure either to provide
25 the Patent Office with a complete and accurate translation of the disclosure of
26 Fujiwara during the prosecution of the '966 and '263 Patents and/or to correct the
27 characterization of Fujiwara in the '966 and '263 Patent applications constitutes a
28

1 violation of its duty under 37 CFR § 1.56 to disclose information material to
2 patentability.

3 58. On information and belief, such a violation of 37 CFR § 1.56 renders
4 the '966 and '263 Patents unenforceable.

5 **The Challenged '263 Patent**

6 **Is Unenforceable for Inequitable Conduct – Prior Art '396 Patent**

7 59. On October 19, 2010, AWM was granted U.S. Patent No. 7,815,396
8 (“’396 Patent”), attached hereto as **Exhibit 9**. The '396 Patent is directed to a wave
9 generating apparatus.

10 60. The '396 Patent is prior art that was incorporated by reference, in its
11 entirety, into the '263 Patent (Ex. 3, at 4:20-23).

12 61. Substantial disclosures, including as to Figures 2 and 2A of the prior
13 art '396 Patent, are structurally the same as the corresponding portions of the '263
14 Patent. On information and belief, AWM's representative prepared, filed, and
15 prosecuted each of the prior art '396 Patent, as well as the later granted '263 Patent.

16 62. 37 CFR § 1.56 imposes upon the patentee a duty to disclose
17 information material to patentability.

18 63. During prosecution of the '263 Patent the Patent Office rejected all
19 pending claims as being rendered obvious over the prior art '396 Patent. In its
20 October 10, 2015 Response to the Office Action, attached hereto as **Exhibit 10**,
21 AWM amended the claims and argued in support of such an amendment that the
22 prior art '396 Patent did not disclose actuating the release of water from the
23 chambers independently of each other to generate waves (Ex. 10, at p.7).

24 64. On information and belief, AWM was aware at the time it filed its
25 Response to the Office Action (Ex. 10) that the prior art '396 Patent contained the
26 same chamber, valve, and controller structure and functional capability as the '263
27 Patent and that its characterization of the prior art '396 Patent was inaccurate and
28 misleading to the Patent Office and a violation of its duty under 37 CFR § 1.56.

1 65. On information and belief, such a violation of 37 CFR § 1.56 renders
2 the '263 Patent unenforceable.

3 **The Challenged Patents Are Invalid Under Section 112**

4 66. On information and belief, the Challenged Patents are invalid for
5 failing to meet one or more requirements of 35 U.S.C. § 112.

6 67. On information and belief, the '966 Patent is invalid for failing to meet
7 the legal requirements of 35 U.S.C. 112. By way of example, each of independent
8 Claims 1, 11, and 16 of the '966 Patent incorporate the following limitation:

9 “each of the plurality of chambers having a valve structure.”

10 The term “valve structure” does not appear in the specification of the '966 Patent,
11 and the '996 Patent does not describe with reasonable certainty how to determine
12 what is a “valve structure.”

13 68. On information and belief, the '263 Patent is invalid for failing to meet
14 the legal requirements of 35 U.S.C. 112. By way of example, independent Claims 1
15 and 13 of the '263 Patent incorporate the following limitation:

16 “a controller connected to the chambers, wherein the connection is
17 constructed to actuate the release of water from each chamber to create
18 waves independently of the release of water from the other chambers.”

19 The '263 Patent does not describe with reasonable certainty how a connection can
20 be constructed to actuate the release of water “from each chamber to create waves
21 independently of the release of water from other chambers.”

22 69. On information and belief, the '663 Patent is invalid for failing to meet
23 the legal requirements of 35 U.S.C. 112. By way of example, Claim 1 of the '663
24 Patent incorporate the following limitation:

25 “wherein when the wave generator is actuated, a wave forms at the deep
26 edge, breaks over the junction of the first pool bottom portion and the second
27 pool bottom portion.”

28 The '663 Patent does not describe with reasonable certainty how to determine if and

1 when a wave “breaks.”

2 70. On information and belief, the ’492 Patent is invalid for failing to meet
3 the legal requirements of 35 U.S.C. 112. By way of example, Claims 8 and 16 of
4 the ’492 Patent are dependent claims, which incorporate the following limitation:

5 “The apparatus of claim [1/9], wherein the controller further performs the
6 following step before (b): if the measured pressure has peaked then continue
7 to step (b).”

8 Neither the specification nor the claims of the ’492 Patent sufficiently describe with
9 reasonable certainty how to determine if and when the measured pressure has
10 peaked.

11 71. The deficiencies in the patent description and claims provided herein
12 are intended as a non-exhaustive list of examples only. On information and belief,
13 other invalidating deficiencies exist that render the Challenged Patents invalid
14 under 35 U.S.C. §§ 112(a) and/or (b).

15 **AWM Has Not Satisfied Its Burden To Demonstrate Infringement Of The** 16 **Challenged Patents**

17 72. As discussed above, AWM has accused WhiteWater’s Endless Surf™
18 product of infringing the Challenged Patents and made related threats of litigation.
19 AWM, however, has not specified how the Endless Surf™ product satisfies each
20 limitation of a single claim of the Challenged Patents. WhiteWater’s making, using,
21 offering for sale, selling, and/or importing the Endless Surf™ product differs in
22 significant ways from what is disclosed in the Challenged Patents.

23 73. Although it is not WhiteWater’s burden to demonstrate non-
24 infringement, it provides the brief discussion relating to two of the patents (below),
25 for the limited purpose of exemplifying AWM’s inability to prove infringement.
26 For example, the ’663 Patent has a single independent claim. Claim 1 of the ’663
27 Patent requires that the “pool bottom comprises two portions, a first pool bottom
28 portion having a first angle of inclination relative to horizontal, and a second pool

1 bottom portion having a second angle relative to horizontal, wherein the first angle
 2 is greater than the second angle.” (Ex. 2, at 10:42-11:15). WhiteWater’s Endless
 3 Surf™ product does not have a pool bottom formed of two portions such that the
 4 first pool bottom has a first angle of inclination relative to the horizontal, and a
 5 second pool bottom that has a second angle of inclination relative to the horizontal
 6 such that the first angle is greater than the second angle.

7 74. In addition, the ’492 Patent requires “a plurality of sensors connected
 8 to the plenum and adapted to measure the pressure of the plenum” along with “a
 9 controller connected to the vents and sensors, wherein the controller is constructed
 10 to perform the following steps: measure the pressure from a sensor in the plurality
 11 of sensors; when the measured pressure is greater than a preset set point, then
 12 actuate a vent from the plurality of vents to release pressure.” (Ex. 4, at 7:8-19).
 13 WhiteWater’s Endless Surf™ product does not have a plurality of sensors
 14 connected to the plenum and adapted to measure the pressure of the plenum or a
 15 controller connected to the vents and sensors to measure the pressure from a sensor
 16 in the plurality of sensors and when the measured pressure is greater than a preset
 17 set point, to then actuate a vent from the plurality of vents to release pressure.

18 75. Because AWM has threatened to file, but has not yet filed, an
 19 infringement action to enforce the Challenged Patents, WhiteWater does not know
 20 what specific claims AWM contends WhiteWater may infringe. On information and
 21 belief, AWM will not be able to satisfy its burden to prove that WhiteWater’s
 22 Endless Surf™ product infringes any claim of the Challenged Patents, either
 23 directly or indirectly, either literally or under the doctrine of equivalents.

24 **FIRST CAUSE OF ACTION**

25 **Patent Invalidity of the Challenged Patents**

26 76. Plaintiff incorporates the allegations of paragraphs 1 through 75 as if
 27 set forth herein.
 28

7 79. The Challenged Patents are invalid under 35 U.S.C. § 102 because
8 they are anticipated by existing prior art.

81. The Challenged Patents are invalid under 35 U.S.C. § 112(a) because the claims are not enabled by the specification and the Challenged Patents lack a sufficient written description.

83. Plaintiff seeks a declaratory judgment that the Challenged Patents are
invalid under 35 U.S.C. §§ 102, 103, and 112.

Unenforceability of the '966 and '263 Patents

85. An actual and substantial controversy has arisen and now exists
between the parties concerning the enforceability of the '966 and '263 Patent

86. Defendant claims that the '966 and '263 Patents are enforceable and may be asserted against Plaintiff, its business associates, and its potential

1 customers, and have threatened to assert the '966 and '263 Patents against Plaintiff,
2 its business associates, and its potential customers.

3 87. In connection with application for each of the '966 and '263 Patents,
4 the named inventor, Bruce McFarland, signed a declaration, which under 37 C.F.R.
5 § 1.63(c) obligated him to first review and understand his duty of good faith and
6 candor before the USPTO and the requirement of 37 C.F.R. § 1.56 to disclose
7 information material to patentability to the USPTO.

8 88. The '966 and '263 Patents are unenforceable because, despite such
9 duty of candor, and with a specific intent to deceive the USPTO, AWM made
10 intentional and material misrepresentations or omissions to the USPTO including,
11 but not limited to (i) at the time AWM filed the '966 Patent, AWM was aware that
12 Fujiwara and the '396 Patent each constituted material prior art and intentionally
13 failed to accurately and completely disclose either the Fujiwara or the '396 Patent
14 to the USPTO.

15 89. The USPTO would not have issued the '966 and '263 Patents but for
16 AWM's failure to completely and accurately disclose material prior art, including
17 Fujiwara and the '396 Patent.

18 90. Plaintiff seeks a declaratory judgment that the '966 and '263 Patents
19 are each unenforceable under 37 CFR § 1.56.

20 **THIRD CAUSE OF ACTION**

21 **Non-Infringement of the Challenged Patents**

22 91. Plaintiff incorporates the allegations of paragraphs 1 through 90 as if
23 set forth herein.

24 92. An actual controversy has arisen and now exists between the parties
25 concerning whether Plaintiff's making, using, offering for sale, selling, and/or
26 importing WhiteWater's Endless Surf™ product infringes any valid and
27 enforceable claim of the Challenged Patents.
28

1 93. Defendant claims that Plaintiff infringes one or more claims of each of
2 the Challenged Patents and has threatened to assert the Challenged Patents against
3 Plaintiff, its business associates, and its potential customers.

4 94. Despite its infringement claims, Defendant has failed to provide any
5 meaningful support, specific claim charts or a limitation-by-limitation analysis of
6 any of the claims of the Challenged Patents to support its infringement position,
7 either literally or under the doctrine of equivalents.

8 95. Plaintiff seeks a declaratory judgment that making, using, importing,
9 offering to sell, and selling WhiteWater's Endless Surf™ product does not and will
10 not infringe any valid and enforceable claim of the Challenged Patents.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff requests that judgment be entered in favor of
13 Plaintiff and against Defendant:

- 14 1. Declaring the Challenged Patents invalid;
- 15 2. Declaring the Challenged Patents unenforceable;
- 16 3. Declaring that the making, using, importing, offering to sell, and
17 selling of WhiteWater's Endless Surf™ product does not and will not infringe any
18 valid and enforceable claim of the Challenged Patents;
- 19 4. Enjoining Defendant from enforcing the Challenged Patents;
- 20 5. Finding that this is an exceptional case under 35 U.S.C. § 285;
- 21 6. Awarding Plaintiff its costs and attorney's fees; and
- 22 7. Awarding Plaintiff such other relief as the Court deems just and
23 proper.

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DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff
demands a trial by jury of all issues so triable.

DATED: May 20, 2022

BUCHALTER
A Professional Corporation

By: /s/ J. Rick Taché
J. Rick Taché
Joanne N. Davis
Roger L. Scott
*Attorneys for Plaintiff WhiteWater West
Industries, Ltd.*