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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **OAKLAND DIVISION**

18 SHARPER IMAGE CORPORATION, a Delaware)
corporation, and ZENION INDUSTRIES, INC., a)
19 California corporation,)
20 Plaintiffs,)
21 v.)
22 NEOTEC, INC., a Nevada corporation, INDOOR)
PURIFICATION SYSTEMS, INC., a Utah)
23 corporation, and ASSET MARKETING)
SERVICES, INC. d/b/a Next Ten,)
24 Defendants.)

Case No. C 03 4426 (CW)
FIRST AMENDED COMPLAINT FOR
VIOLATIONS OF:
1. 35 U.S.C. § 271;
2. 15 U.S.C. § 1125; and
3. CAL. BUS. & PROF. CODE § 17200
Demand for Jury Trial

1 Plaintiffs Sharper Image Corporation and Zenion Industries, Inc. (collectively “Sharper
2 Image”), for their first amended complaint against defendants Indoor Purification Systems, Inc.
3 (“IPS”), and Asset Marketing Services, Inc., d/b/a Next Ten (“AMS”) (collectively “Defendants”),
4 allege as follows:

5 **The Parties**

6 1. Sharper Image is a Delaware corporation with its principal place of business at 650
7 Davis Street, San Francisco, California.

8 2. Zenion is a California corporation with its principal place of business at 5430
9 Commerce Boulevard, Rohnert Park, California.

10 3. IPS is a Utah corporation with its principal place of business at 1052 South Arbor
11 Way, Layton, Utah. IPS conducts business nationwide, claiming to be the “exclusive supplier and
12 service center for [its principal ionic air purification product] in North America.” It sells its products
13 on its fully interactive Web site, www.surroundair.com, and through its toll free customer service
14 number, 1-888-812-1516. At all times material, IPS committed the acts complained of herein in this
15 district.

16 4. AMS is a Minnesota corporation with its principal place of business at 14101
17 Southcross Drive W, Burnsville, Minnesota. AMS conducts business nationwide, claiming to be the
18 North American marketing or distributing arm for several companies. It sells its products on its fully
19 interactive Web site, www.nextten.com, and through its toll free customer service number, 1-800-
20 482-9147. At all times material, AMS committed the acts complained of herein in this district.

21 5. Pursuant to 28 U.S.C. §§ 1331 and 1338, this Court has jurisdiction over the federal
22 claims alleged herein. Pursuant to 28 U.S.C. § 1367, this Court has jurisdiction over the state law
23 claim because it arises from a nucleus of operative facts common to the federal claims.

24 6. Under 28 U.S.C. § 1391(c), venue lies in this judicial district because Defendants are
25 subject to personal jurisdiction in this district and have caused the injuries complained of herein in
26 this district.

Sharper Image's Business

1
2 7. Sharper Image was founded in 1977 and is a leading specialty retailer/product
3 developer that is nationally and internationally renowned as the source of innovative, high quality
4 products that are useful, entertaining, and designed to make life easier and more enjoyable.

5 8. Over the years, Sharper Image has built an unparalleled multi-channel distribution
6 system: It sells products via catalogs, the Internet, nationally aired infomercials, direct mailings,
7 wholesale to department stores, and in more than 140 Sharper Image retail stores throughout the
8 United States and Europe.

Sharper Image Design® Products

9
10 9. Sharper Image has invested multiple millions of dollars developing a proprietary line
11 of products, known as Sharper Image Design® products. Sharper Image Design® products form a
12 substantial portion of the foundation of the company's success. Over the past few years and
13 continuing to date, a significant percentage of Sharper Image's sales were attributable to these
14 products, which are conceived of, designed, engineered, and marketed solely by Sharper Image.
15 Certain Sharper Image Design® products, such as the Ionic Breeze® product line, have significantly
16 contributed to this success.

17 10. Sharper Image Design® products are unique and have no equal in the marketplace.
18 Nearly all of these products incorporate patented technologies, and represent clear value to
19 customers because of their imaginative, problem-solving usefulness. Some of its best-sellers are
20 Sharper Image Design® Ionic Breeze® products, including the Ionic Breeze® Quadra® Air Purifier,
21 the Ionic Breeze® Quadra® Compact Air Purifier, the Ionic Breeze® GP Air Purifier with
22 Ultraviolet Germicidal Protection, the Ionic Breeze® Personal Air Purifier, the Ionic Breeze® Air
23 Freshener for Bathrooms and Small Spaces, the Ionic Hair Wand, and several other Ionic Breeze®
24 products having unique consumer applications.

25 11. A majority of Sharper Image Design products are sold in boxes marked as "patented"
26 with applicable U.S. patent numbers.

Sharper Image's Ionic Breeze® Product Line

12. Sharper Image's Ionic Breeze® products are innovative and unique because they purify air without the use of costly filters—instead, patented Ionic Breeze® technology uses wire electrodes to charge airborne particulates, which are then attracted to oppositely-charged collection rods. Rather than purchase costly replacement filters, users can easily and continuously clean the collection rod by simply wiping it with a soft towel. Consumers have come to recognize Sharper Image as the exclusive source of filter-less air purifiers.

13. In another application of patented Ionic Breeze® technology, typically found in smaller product forms such as wall units, brushes, and wearable purifiers, fine needle-like points are used (instead of wire electrodes) to charge airborne particulates. These airborne particulates are then attracted to oppositely-charged collection rings (rather than collection rods).

14. The Ionic Breeze® product line is protected by several United States patents owned by Sharper Image, including United States Letters Patent No. 4,789,801 (the “801 patent”), which issued on December 6, 1988, for an invention entitled “Electrokinetic Transducing Methods And Apparatus And Systems Comprising Or Utilizing The Same” (**Exhibit A**), United States Letters Patent No. 6,163,098 (the “098 patent”), which issued on December 19, 2000 for an invention entitled “Electro-Kinetic Air Refreshener-Conditioner with Optional Night Light” (**Exhibit B**), United States Letters Patent No. 6,176,977 (the “977 patent”), which issued on January 23, 2001 for an invention entitled “Electro-Kinetic Air Transporter Conditioner” (**Exhibit C**) and United States Letters Patent No. Des. 410,540 (the “540 patent”), which issued on June 1, 1999 for an invention entitled “Ambient Air Purifier” (**Exhibit D**).

Defendants' Businesses

15. IPS is a Sharper Image competitor, offering for sale and selling ionic air purification products.

16. AMS is likewise a Sharper Image competitor, offering for sale and selling ionic air purification products.

17. IPS and AMS are selling an air purifier (IPS refers to it as the “XJ-2000” and AMS refers to it as the “Surround Air Ionic Air Filter”), which is an ionic air purifier designed to clean one

1 average room (anywhere from 250 to 500 square feet), and which Defendants claim is silent, does
2 not use filters, and operates on ultra low power consumption.

3 18. IPS is or was selling a portable kitchen/bathroom/closet air purifier entitled the “XJ-
4 902 Air Purifier with Anion Generator” (“XJ-902”). This product features ionic air purification
5 technology and a removable dust collector plate.

6 19. In operation and/or technological design, the XJ-2000 and XJ-902 are identical to
7 Sharper Image’s patented Ionic Breeze® products (such as the Ionic Breeze® Quadra® and the Ionic
8 Breeze® Air Freshener for Bathrooms and Small Spaces).

9 20. Since Defendants compete directly with Sharper Image, their disregard of Sharper
10 Image’s patent rights will result in irreparable harm to Sharper Image unless enjoined.

11 **IPS Is Misleading the Public**

12 21. In promoting and advertising its products, IPS makes a series of comparisons to
13 Sharper Image’s Ionic Breeze® products, including the following:

14
15 The Surround Air XJ-902 produces negative ions, while the Ionic
16 Breeze Quadra® air purifiers produce positive ions. The air-cleaning
17 benefits of negative ions are well understood and establish (sic) in the
18 scientific community. Positive ions do not offer any air-cleaning
19 benefits. In fact, there are studies indicating potentially adverse health
20 effects.

21 The stainless steel, ion-producing needlepoints of the Surround Air
22 ionizer are also **far more durable** than the ionizing wires used the by
23 Ionic Breeze.

24 **(Exhibit E.** Emphasis in original).

25 22. These comparison statements are knowingly false.

26 **Count I - Patent Infringement of U.S. Patent No. 4,789,801 – 35 U.S.C. § 271**

27 (Against both Defendants)

28 23. Sharper Image and Zenion reallege and incorporate by reference the allegations
contained in paragraphs 1 through 22.

29 24. This action arises under the patent laws of the United States, Title 35 of the United
States Code.

1 25. Zenion is the assignee and owner of the ‘801 patent and Sharper Image is its
2 exclusive licensee.

3 26. The ‘801 patent, along with other patents, protects Sharper Image’s Ionic Breeze®
4 technology.

5 27. IPS makes, uses, offers to sell, sells and/or imports an ionic air purifier (namely the
6 XJ-2000). AMS makes, uses, offers to sell, sells and/or imports an ionic air purifier (namely the
7 “Surround Air Ionic Air Filter”). Each Defendant either commits or enables others to commit such
8 acts.

9 28. Defendants are infringing at least one claim of the ‘801 patent by making, using,
10 selling, offering for sale and/or importing for sale their ionic air purifiers, or are inducing or have
11 induced the infringement of the ‘801 patent.

12 29. Defendants will continue to commit such acts of infringement unless enjoined by this
13 Court.

14 30. Sharper Image has placed the required statutory notice on products manufactured or
15 sold under the ‘801 patent.

16 31. Defendants have continued to commit one or more of the acts described in the
17 preceding paragraphs with full knowledge of Sharper Image’s patent.

18 **Count II - Patent Infringement of U.S. Patent No. 6,163,098 – 35 U.S.C. § 271**

19 (Against IPS only)

20 32. Sharper Image realleges and incorporates by reference the allegations contained in
21 paragraphs 1 through 31.

22 33. This action arises under the patent laws of the United States, Title 35 of the United
23 States Code.

24 34. The ‘098 patent, along with other patents, protects Sharper Image’s Ionic Breeze®
25 technology.

26 35. IPS makes, uses, offers to sell, sells and/or imports the XJ-902 ionic air purifier, or
27 enables others to commit such acts.

1 36. IPS is infringing at least one claim of the '098 patent by making, using, selling,
2 offering for sale and/or importing for sale the XJ-902, or is inducing or has induced the infringement
3 of the '098 patent.

4 37. IPS will continue to commit such acts of infringement unless enjoined by this Court.

5 38. Sharper Image has placed the required statutory notice on products manufactured or
6 sold under the '098 patent.

7 39. IPS has continued to commit one or more of the acts described in the preceding
8 paragraphs with full knowledge of Sharper Image's patent.

9 **Count III - Patent Infringement of U.S. Patent No. 6,176,977 – 35 U.S.C. § 271**

10 (Against IPS only)

11 40. Sharper Image realleges and incorporates by reference the allegations contained in
12 paragraphs 1 through 39.

13 41. This action arises under the patent laws of the United States, Title 35 of the United
14 States Code.

15 42. The '977 patent, along with other patents, protects Sharper Image's Ionic Breeze®
16 technology.

17 43. IPS makes, uses, offers to sell, sells and/or imports the XJ-902 ionic air purifier, or
18 enables others to commit such acts.

19 44. IPS is infringing at least one claim of the '977 patent by making, using, selling,
20 offering for sale and/or importing for sale the XJ-902, or is inducing or has induced the infringement
21 of the '977 patent.

22 45. IPS will continue to commit such acts of infringement unless enjoined by this Court.

23 46. Sharper Image has placed the required statutory notice on products manufactured or
24 sold under the '977 patent.

25 47. IPS has continued to commit one or more of the acts described in the preceding
26 paragraphs with full knowledge of Sharper Image's patent.

27 **Count IV - Patent Infringement of U.S. Patent No. Des. 410,540 - 35 U.S.C. § 271**

28 (Against IPS only)

1 48. Sharper Image realleges and incorporates by reference the allegations contained in
2 paragraphs 1 through 47.

3 49. This action arises under the patent laws of the United States, Title 35 of the United
4 States Code.

5 50. The '540 patent protects the ornamental design of Sharper Image's ambient air
6 purifier.

7 51. IPS makes, uses, offers to sell, sells and/or imports the XJ-902 ionic air purifier, or
8 enables others to commit such acts.

9 52. IPS is infringing the '540 patent by making, using, selling, offering for sale and/or
10 importing for sale the XJ-902, or is inducing or has induced the infringement of the '540 patent.

11 53. IPS will continue to commit such acts of infringement unless enjoined by this Court.

12 54. IPS has continued to commit one or more of the acts described in the preceding
13 paragraphs with full knowledge of Sharper Image's patent.

14 **Count V – False Advertising – 15 U.S.C. § 1125**

15 (Against IPS only)

16 55. Sharper Images realleges and incorporates by reference the allegations contained in
17 paragraphs 1 through 55.

18 56. IPS has made false statements about the nature, characteristics, and qualities of
19 Sharper Image's Ionic Breeze® products and/or its own ionic air purifier products.

20 57. These statements were made in commercial advertisements and/or promotions in
21 interstate commerce.

22 58. Because of their falsity, these statements actually deceived and/or had a tendency to
23 deceive a substantial segment of their audience.

24 59. These deceptions are material in that they are likely to influence consumers'
25 purchasing decisions.

26 60. Sharper Image has been and will continue to be injured as a result of IPS' conduct.
27 Sharper Image has no adequate remedy at law for these injuries. Unless IPS is restrained by this
28 Court from continuing its false advertising, these injuries will continue to accrue.

1 61. IPS' actions constitute false advertising in violation of 15 U.S.C. § 1125(a)(1)(B).

2 **Count VI- Unfair Competition - Cal. Bus. & Prof. Code § 17200**

3 (Against IPS only)

4 62. Sharper Images realleges and incorporates by reference the allegations contained in
5 paragraphs 1 through 61.

6 63. IPS' false advertising of its ionic air purifier products is an act of unfair competition
7 in violation of section 17200 of the California Business & Professions Code, defined therein to mean
8 "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or
9 misleading advertising."

10 64. IPS has engaged in unfair competition by the acts complained of herein and has
11 caused Sharper Image substantial injury. Sharper Image has no adequate remedy at law for these
12 injuries. Unless IPS is restrained by this Court from continuing its acts of unfair competition, these
13 injuries will continue to accrue.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Sharper Image prays for judgment as follows:

16 A. That this Court adjudge and decree that Defendants have infringed one or more
17 claims of the '801 patent;

18 B. That this Court permanently enjoin Defendants, their officers, agents, servants,
19 employees, attorneys, successors, and assigns, and all others in active concert or participation with
20 them, from continued infringement of the '801 patent;

21 C. That Sharper Image be awarded damages against Defendants for their infringement of
22 the '801 patent;

23 D. That this Court adjudge and decree that IPS has infringed one or more claims of the
24 '098, '977, and '540 patents;

25 E. That this Court permanently enjoin IPS, its officers, agents, servants, employees,
26 attorneys, successors, and assigns, and all others in active concert or participation with it, from
27 continued infringement of the '098, '977, and '540 patents;

1 F. That Sharper Image be awarded damages against IPS for its infringement of the '098,
2 '977, and '540 patents;

3 G. That Sharper Image be awarded IPS's profits under 35 U.S.C. § 289;

4 H. An order finding IPS has engaged in false advertising in violation of 15 U.S.C. §
5 1125;

6 I. That this Court permanently enjoin IPS, its officers, agents, servants, employees,
7 attorneys, successors, and assigns, and all others in active concert or participation with it, from
8 continued false advertising in violation of 15 U.S.C. § 1125;

9 J. That Sharper Image be awarded damages against IPS for its false advertising;

10 K. An order finding IPS has engaged in unfair competition in violation of § 17200 of the
11 California Business and Professions Code;

12 L. That this Court permanently enjoin IPS, its officers, agents, servants, employees,
13 attorneys, successors, and assigns, and all others in active concert or participation with it, from
14 continued unfair competition in violation of § 17200;

15 M. An order disgorging IPS from its profits for violation of § 17200;

16 N. An award for Sharper Image's costs and attorneys' fees; and

17 O. Any other relief this Court deems just and proper.

18

JURY DEMAND

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20 Plaintiffs, Sharper Image Corporation and Zenion Industries, Inc., request a trial by jury of all
21 claims so triable.

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DATED: April 8, 2004

SHARPER IMAGE CORPORATION and ZENION INDUSTRIES, INC., Plaintiffs

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