

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RESTORATION INDUSTRY ASSOCIATION,)
INC.,)

Plaintiff,)

v.)

THERMAPURE, INC.,)

and)

DAVID HEDMAN)

Defendant.)

No. 2:13-cv-00122-TSZ

**FIRST AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT**

JURY DEMAND

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Restoration Industry Association, Inc. (“RIA”) by and through its attorneys,
alleges as follows:

NATURE OF THE LAWSUIT

1. This is a civil action arising under the Patent Laws of the United States, Title 35 of the United States Code, and under the Declaratory Judgment Act, 28 U.S.C. § 2201, which arises from an actual and existing controversy between RIA and Defendants ThermaPure, Inc. (“ThermaPure”) and David Hedman (“Hedman”).

2. Plaintiff RIA requests a declaration that United States Patents Nos. 6,327,812 (the “812 Patent”), 6,892,491 (the “491 Patent”), 7,690,148 (the “148 Patent”), 8,221,678 (the “678 Patent”), 8,256,135 (the “135 Patent”), and 8,272,143 (the “143 Patent”) (collectively,

FIRST AMENDED COMPLAINT FOR
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Case No. 2:13-cv-00122-TSZ

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1 the “Patents-in-Suit”) are invalid and/or unenforceable. True and correct copies of the Patents-in-
2 Suit are attached as Exhibits A through F, respectively.

3 3. The Patents-in-Suit are related by priority claims and share significant portions
4 of their specifications.

5 4. The Patents-in-Suit all claim related subject matter generally directed towards
6 removing or treating harmful biological and organic substances within an enclosure, which
7 includes heating the ambient air within the enclosed area to a predetermined temperature over
8 time to cause harmful biological or organic substances to be destroyed or migrate into the
9 ambient air. *See, e.g.*, Abstracts of Exhs. A-F.

10 **THE PARTIES**

11 5. Plaintiff RIA is a non-profit Maryland corporation with a principal place of
12 business at 12339 Carroll Avenue, Rockville, Maryland, 20852.

13 6. On information and belief, Defendant ThermaPure is a corporation organized
14 under the laws of the state of California and having a principal place of business at 180 Canada
15 Larga Road, Ventura, California 93001.

16 7. On information and belief, Defendant David Hedman is an individual residing in
17 Ventura, California.

18 **JURISDICTION AND VENUE**

19 8. This is an action arising under the Patent Laws of the United States, 35 U.S.C. §
20 1 *et seq.* This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338(a), 1367, 2201 and 2202.

21 9. Venue in this District is proper under 28 U.S.C § 1391(b) because ThermaPure
22 has asserted the ‘812 Patent in this District, thereby placing all patents in the same “patent
23 family” (the Patents-in-Suit) at issue in declaratory actions regarding invalidity and
24 unenforceability.

1 10. This Court has personal jurisdiction over ThermaPure because it has availed
2 itself of this District. *See, e.g., ThermaPure v. Water Out Oregon*, Case No. 3:11-cv-05958
3 (W.D. Wash.).

4 11. This Court has personal jurisdiction over Hedman because he was personally
5 served with the First Amended Complaint while physically present in this state and judicial
6 district.

7 **EXISTENCE OF AN ACTUAL CONTROVERSY**

8 12. RIA is the oldest and largest non-profit, professional trade association dedicated
9 to providing leadership and promoting best practices in the restoration industry. RIA represents
10 over 20,000 cleaning and restoration professionals from 1,100 member firms across the United
11 States specializing in restoration and related services.

12 13. ThermaPure is a for-profit California corporation.

13 14. Hedman is an individual resident of California.

14 15. RIA believes a reasonable opportunity for further discovery will show that
15 ThermaPure owns all six Patents-in-Suit.

16 16. Alternatively, to whatever extent, if any, ThermaPure does not already own one
17 or more of the Patents-in-Suit, RIA believes a reasonable opportunity for discovery will show
18 that inventor Hedman is obliged to assign all of the Patents-in Suit to ThermaPure pursuant to his
19 employment contract with ThermaPure.

20 17. Alternatively, to whatever extent, if any, ThermaPure does not already own one
21 or more of the Patents-in-Suit, RIA believes a reasonable opportunity for discovery will show
22 that inventor Hedman is obliged to assign all of the Patents-in Suit to ThermaPure pursuant to his
23 fiduciary obligations to ThermaPure.

24 18. Alternatively, to whatever extent, if any, ThermaPure does not already own one
25 or more of the Patents-in-Suit, RIA believes a reasonable opportunity for discovery will show
26

1 that inventor Hedman is obliged to assign all of the Patents-in Suit to ThermaPure pursuant to
2 other state law.

3 19. Alternatively, to whatever extent, if any, David Hedman is not obliged to assign
4 any of the Patents-in-Suit to ThermaPure, RIA believes a reasonable opportunity for discovery
5 will show that ThermaPure is an alter ego of David Hedman.

6 20. Alternatively, to whatever extent, if any, ThermaPure does not already own one
7 or more of the Patents-in-Suit, Hedman owns that one or more of the Patents-in-Suit and is a
8 defendant in this suit.

9 21. ThermaPure has initiated at least 17 lawsuits across the country asserting
10 infringement of the '812 Patent since 2010. Many of these lawsuits name RIA members as
11 defendants. A true and correct summary of these lawsuits is attached as Exhibit G.

12 22. ThermaPure sued Water Out Oregon, Inc., an RIA member, in the Western
13 District of Washington, alleging infringement of the '812 Patent, in case No. 3:11-cv-05958BHS.
14 Water Out Oregon, Inc., counterclaimed alleging invalidity of the '812 Patent. Water Out
15 Oregon, Inc. also sought a covenant from ThermaPure that it would not sue alleging
16 infringement of the remaining Patents-in-Suit. ThermaPure refused to grant the covenant.

17 23. Water Out Oregon, Inc. was granted summary judgment of non-infringement of
18 the '812 Patent, but its counterclaim for invalidity has not been resolved and that suit is still
19 pending in this Court. Water Out Oregon, Inc.'s motion to consolidate its counterclaim for
20 invalidity with this lawsuit is also currently pending before this Court.

21 24. ThermaPure sued Just Right Cleaning and Construction, Inc., an RIA member, in
22 the Eastern District of Washington, alleging infringement of the '812 Patent. Just Right Cleaning
23 and Construction, Inc., counterclaimed alleging invalidity of the '812 Patent. That suit, No. 3:11-
24 cv-05958BHS, is still pending in the Eastern District of Washington.

25 25. For decades, RIA members have engaged in activities which ThermaPure alleges
26 are claimed in the Patents-in-Suit. RIA members' standard commercial practices expose them to

1 threats of litigation by ThermaPure, as have been brought against other members including
2 Water Out Oregon, Inc. and Just Right Cleaning and Construction, Inc.

3 26. A substantial and continuing controversy exists between RIA and ThermaPure
4 with regard to the right of ThermaPure to threaten or maintain suit against RIA members for
5 infringement of the Patents-in-Suit.

6 27. Based on RIA's review of ThermaPure's continuing pattern of suing RIA
7 members for infringement of various of the Patents-in-Suit, and denying its member a covenant
8 not to sue, RIA and its members reasonably believe that ThermaPure will sue more RIA
9 members on various of the related patents and places all Patents-in-Suit at issue. ThermaPure has
10 affirmatively sought enforcement of its patents against multiple RIA members.

11 28. RIA, on behalf of its members, therefore seeks a declaration of invalidity of the
12 Patents-in-Suit.

13 29. A substantial part of RIA's purpose is to educate members and industry
14 professionals on up-to-date best practices. RIA's members have challenged and questioned those
15 teaching materials, questioning whether following RIA's educational materials exposes RIA
16 members to patent infringement litigation by ThermaPure and/ or Hedman related to the Patents-
17 in-Suit.

18 30. RIA cannot fulfill its educational role of assisting members in performing best
19 practices in restoration without knowing whether its instruction and education exposes members
20 to legal liability.

21 31. As a result of enforcement activities of the Patents-in-Suit, RIA's core mission of
22 education and training has been substantially curtailed, as members do not want to receive
23 training that the member might reasonably believe exposes it to legal liability for patent
24 infringement.

25 32. RIA has been forced to divert manpower and attention from its role of training
26 and educating industry professionals into investigating the Patents-in-Suit and attempting to

1 redraft training materials to both present best practices as well as avoid presenting instructional
2 materials that members fear expose them to liability.

3 33. Instead of educating professionals about restoration and remediation, RIA has
4 been forced to divert attention of its professional staff and board to educating members about
5 patent law, a field in which it has no particular interest or expertise but about which its members
6 have increasingly sought guidance.

7 34. RIA, on its own behalf, therefore seeks a declaration of invalidity of the Patents-
8 in-Suit so that it can continue its educational and training role without concern that members
9 who follow its instructional and training materials might then be threatened with infringement
10 litigation by ThermaPure and/or Hedman.

11 **THE PATENTS**

12 35. According to its Abstract, the '812 Patent generally describes and claims a
13 method and kit of components for destroying organisms and toxins in from an enclosure such as
14 a building. Temperature sensing probes are installed in the enclosure to indicate structure
15 temperature and a recorder is used to record the temperature of said sensing probes in real time.
16 Hot air is introduced into the enclosure through one or more ducts to raise the structure
17 temperature to at least about 120°F. . . to kill essentially all insects, bacteria, virus, dust mites,
18 spiders, silver fish, fungi and toxic molds . . . The air can exit through open doors and windows
19 or through ducts to a filter assembly that captures the remains of the organisms. *See* Exh. A, '812
20 Patent, Abstract.

21 36. According to its Abstract, the '491 Patent generally describes and claims a
22 system and method for removing harmful biological and organic substances from an enclosure,
23 vehicle or container . . . A plurality of temperature probes are positioned at predetermined
24 locations within the enclosure. The air within the structure is heated . . . to kill organisms and
25 cause harmful substances in the enclosure to migrate into the ambient air. *See* Exh. B, '491
26 Patent, Abstract.

1 37. According to its Abstract, the ‘148 Patent generally describes a process for
2 removing or treating harmful biological and chemical substances from an enclosure, such as a
3 building or vehicle by using heated air. The method of the present invention is non-toxic and can
4 be performed in a relatively short amount of time while effectively killing and removing a large
5 proportion of dead organisms and substantially reducing volatile organic compounds. *See* Exh.
6 C, ‘148 Patent, Abstract.

7 38. According to its Abstract, the ‘678 Patent generally describes a system and
8 process . . . for removing or treating harmful biologic and organic substances within an
9 enclosure, such as a container, building or vehicle. Air within the enclosure is heated to a
10 predetermined temperature to kill organisms and cause harmful substances in the structure to
11 migrate into the ambient air. *See* Exh. D, ‘678 Patent, Abstract.

12 39. According to its Abstract, the ‘135 Patent generally describes a process for
13 removing or treating harmful biological and chemical substances from an enclosure, such as a
14 building or vehicle by using heated air. The method of the present invention is non-toxic and can
15 be performed in a relatively short amount of time while effectively killing and removing a large
16 proportion of dead organisms and substantially reducing volatile organic compounds. *See* Exh.
17 E, ‘135 Patent, Abstract.

18 40. According to its Abstract, the ‘143 Patent generally describes a process for
19 removing or treating harmful biological and organic substances within an enclosure, which
20 includes heating the ambient air within the enclosed area to a predetermined temperature over
21 time to cause harmful biological or organic substances to be destroyed or migrate into the
22 ambient air. *See* Exh. F, ‘143 Patent, Abstract.

23 41. The Patents-in-Suit contain in their respective specifications similar and
24 overlapping disclosures. The claims of the Patents-in-Suit are directed towards similar and
25 closely related subject matter.
26

1 42. RIA members accused of infringing the '812 Patent reasonably apprehend that
2 identical or substantially similar conduct could be alleged to infringe any or all of the Patents-in-
3 Suit.

4 43. Members following RIA's educational and training materials do not know
5 whether the best practices described in those materials infringe the Patents-in-Suit and therefore
6 do not know whether they should follow RIA's materials and attend its trainings.

7 44. The purported inventions described and claimed in the Patents-in-Suit are
8 anticipated and/ or rendered obvious in view of prior art patents and applications, including, by
9 way of example only and not by way of limitation, U.S. Pat. No. 4,817,329 to Forbes; EP
10 0979378 to Klemetti; EP 0337212 to Nakashima; U.S. Pat. No. 1,948,228 to Urban; U.S. Pat.
11 No. 4,958,456 to Chaudoin et al.; U.S. Pat. No. 4,961,283 to Forbes; U.S. Pat. No. 6,800,246 to
12 Howe; EP 0807235 to Ludewig et al.; EP 0740506 to Pryor; U.S. Pat. No. 5,607,711 to Lagunas-
13 Solar; and U.S. Pat. No. 4,648,202 to Renth.

14 45. Forbes '329, for example, teaches elements found in claims of many of the
15 Patents-in-Suit, including killing insects with heat in structures, creating and directing that heat
16 using gases such as air, and monitoring temperatures.

17 46. Klemetti, for example, teaches elements found in claims of many of the Patents-
18 in-Suit, including removing moisture from structures and killing mold in structures using heated
19 air, alternating heating and cooling cycles, and heating using electromagnetic radiation.

20 47. Nakashima, for example, teaches elements found in claims of many of the
21 Patents-in-Suit, including using silica air gels to control pests.

22 48. Urban, for example, teaches elements found in claims of many of the Patents-in-
23 Suit, including using heated air to destroy insects within structures.

24 49. Chaudoin, for example, teaches elements found in claims of many of the Patents-
25 in-Suit, including using both boric acid and heat of around 110°F to destroy insects.

1 50. Forbes '283, for example, teaches elements found in claims of many of the
2 Patents-in-Suit, including killing insects with heat, and recirculation of heated air from a
3 structure being treated back to the heat source.

4 51. Howe, for example, teaches elements found in claims of many of the Patents-in-
5 Suit, including use of negative pressure, environmentally acceptable gases, and destroying
6 pathogens including living organisms with heat.

7 52. Ludewig, for example, teaches elements found in claims of many of the Patents-
8 in-Suit, including drying buildings using electromagnetic radiation.

9 53. Pryor, for example, teaches elements found in claims of many of the Patents-in-
10 Suit, including using ozone and heated air to kill insects.

11 54. Lagunas-Solar, for example, teaches elements found in claims of many of the
12 Patents-in-Suit, including using electromagnetic radiation, such as ultraviolet light, to kill
13 insects.

14 55. Renth, for example, teaches elements found in claims of many of the Patents-in-
15 Suit, including using insecticides to kill organisms in structures.

16 56. The purported inventions described and claimed in the Patents-in-Suit are further
17 anticipated and/ or rendered obvious in view of prior art printed publications, including, by way
18 of example only and not by way of limitation, the Journal Of Economic Entomology, Vol. 4
19 (1911); Studies In Termite Control, New Hampshire Agricultural Experiment Station
20 Department of Entomology, Bulletin No. 204 (1922); and United States Army Center for Health
21 Promotion and Preventive Medicine Technical Guide No. 208, "Procedures for Thermal Control
22 of Cockroaches in Army Food Service Facilities" (1997).

23 57. The Journal Of Economic Entomology, Vol. 4 (1911), for example, teaches
24 elements found in claims of many of the Patents-in-Suit, including using heat to kill insects.

1 58. Studies In Termite Control, New Hampshire Agricultural Experiment Station
2 Department of Entomology, Bulletin No. 204 (1922), for example, teaches elements found in
3 claims of many of the Patents-in-Suit, including using heat to kill insects.

4 59. The United States Army Center for Health Promotion and Preventive Medicine
5 Technical Guide No. 208, "Procedures for Thermal Control of Cockroaches in Army Food
6 Service Facilities," (1997), for example, teaches elements found in claims of many of the
7 Patents-in-Suit, including using heat to kill insects in buildings, use of boric acid to kill insects,
8 use of insecticide to kill insects, and preparing and cleaning structures in connection with
9 treating with heat to kill insects.

10 **COUNT 1 – DECLARATORY JUDGMENT OF INVALIDITY OF**

11 **U.S. PATENT NO. 6,327,812**

12 60. Restoration Industry Association incorporates and realleges the foregoing
13 allegations as if fully stated herein.

14 61. An actual, present and justiciable controversy exists as to whether the '812
15 Patent is valid.

16 62. The '812 Patent is invalid for failure to comply with the requirements of the
17 Patent Laws of the United States, Title 35 United States Code, including, among others, §§102,
18 103, and 112.

19 63. By way of example and not limitation, the '812 Patent is invalid under 35 U.S.C.
20 §103 in view of prior art.

21 **COUNT 2 – DECLARATORY JUDGMENT OF INVALIDITY OF**

22 **U.S. PATENT NO. 6,892,491**

23 64. Restoration Industry Association incorporates and realleges the foregoing
24 allegations as if fully stated herein.

25 65. An actual, present and justiciable controversy exists as to whether the '491
26 Patent is valid.

1 66. The '491 Patent is invalid for failure to comply with the requirements of the
2 Patent Laws of the United States, Title 35 United States Code, including, among others, §§102,
3 103, and 112.

4 67. By way of example and not limitation, the '491 Patent is invalid under 35 U.S.C.
5 §103 in view of prior art.

6 **COUNT 3 – DECLARATORY JUDGMENT OF INVALIDITY OF**

7 **U.S. PATENT NO. 7,690,148**

8 68. Restoration Industry Association incorporates and realleges the foregoing
9 allegations as if fully stated herein.

10 69. An actual, present and justiciable controversy exists as to whether the '148
11 Patent is valid.

12 70. The '148 Patent is invalid for failure to comply with the requirements of the
13 Patent Laws of the United States, Title 35 United States Code, including, among others, §§102,
14 103, and 112.

15 71. By way of example and not limitation, the '148 Patent is invalid under 35 U.S.C.
16 §103 in view of prior art.

17 **COUNT 4 – DECLARATORY JUDGMENT OF INVALIDITY OF**

18 **U.S. PATENT NO. 8,221,678**

19 72. Restoration Industry Association incorporates and realleges the foregoing
20 allegations as if fully stated herein.

21 73. An actual, present and justiciable controversy exists as to whether the '678
22 Patent is valid.

23 74. The '678 Patent is invalid for failure to comply with the requirements of the
24 Patent Laws of the United States, Title 35 United States Code, including, among others, §§102,
25 103, and 112.
26

75. By way of example and not limitation, the '678 Patent is invalid under 35 U.S.C. §103 in view of prior art.

COUNT 5 – DECLARATORY JUDGMENT OF INVALIDITY OF

U.S. PATENT NO. 8,256,135

76. Restoration Industry Association incorporates and realleges the foregoing allegations as if fully stated herein.

77. An actual, present and justiciable controversy exists as to whether the '135 Patent is valid.

78. The '135 Patent is invalid for failure to comply with the requirements of the Patent Laws of the United States, Title 35 United States Code, including, among others, §§102, 103, and 112.

79. By way of example and not limitation, the '135 Patent is invalid under 35 U.S.C. §103 in view of prior art.

COUNT 6 – DECLARATORY JUDGMENT OF INVALIDITY OF

U.S. PATENT NO. 8,272,143

80. Restoration Industry Association incorporates and realleges the foregoing allegations as if fully stated herein.

81. An actual, present and justiciable controversy exists as to whether the '143 Patent is valid.

82. The '143 Patent is invalid for failure to comply with the requirements of the Patent Laws of the United States, Title 35 United States Code, including, among others, §§102, 103, and 112.

83. By way of example and not limitation, the '143 Patent is invalid under 35 U.S.C. §103 in view of prior art.

PRAYER FOR RELIEF

WHEREFORE, Restoration Industry Association requests that this Court enter judgment against ThermaPure, and against its affiliates, agents, servants, employees and all persons in active concert or participation with ThermaPure, granting the following relief:

1. Adjudging that each claim of the Patents-in-Suit is invalid and unenforceable under one or more of the patent laws of the United States, including 35 U.S.C. §§ 102, 103, and 112; and

2. Adjudging and decreeing that:

a. Judgment be awarded to Restoration Industry Association on all counts of the Complaint; and

b. Restoration Industry Association be awarded such other and further relief as may be deemed just and proper by the Court.

DATED February 28, 2013.

FOSTER PEPPER PLLC

/s/ Joel B. Ard

/s/ Janelle Milodragovich

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DECLARATION OF SERVICE

I, Joel B. Ard, state that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty one years, I am not a party to this action, and I am competent to be a witness herein. I filed the foregoing using the Court's CM/ECF system, which electronically serves all counsel who have appeared as of this date, thereby serving ThermaPure, Inc.

Defendant David Hedman will be separately served manually, and a certificate of Service as to Defendant Hedman will separately be filed after service is effected.

There are no other parties who have appeared in this action as of today's date that need to be served manually.

I DECLARE under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED February 28, 2013.

/s/ Joel B. Ard

Joel B. Ard

CERTIFICATE OF SERVICE
Case No. 2:13-cv-00122-TSZ

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